

Donoghue v Montefiore Nyack Hosp.

2020 NY Slip Op 34435(U)

May 8, 2020

Supreme Court, Rockland County

Docket Number: No.034174/2018

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, JSC

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GLORIA DONOGHUE, individually and as Executrix
of the Estate of Kenneth C. Donoghue, deceased,

Plaintiff,

DECISION and ORDER

-against-

Index No.034174/2018
Motion Date: Feb. 21, 2020
Seq. 1, 3, 4

MONTEFIORE NYACK HOSPITAL,

Defendant.

-----X
MONTEFIORE NYACK HOSPITAL,

Third-Party Plaintiff,

-against-

EMERGENCY MEDICAL ASSOCIATES and HUDSON
VALLEY RADIOLOGY ASSOCIATES, PLLC,

Third-Party Defendants.
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The following papers were read on this Motion (Seq. No. 1) by Plaintiff for an order granting the following relief: “a) Pursuant to CPLR §1010 and §603 severing the Third-Party action brought by Defendant-Third-Party Plaintiff Nyack Hospital against Third-Party Defendant Emergency Medical Association of New York , P.C., incorrectly s/h/a ‘Emergency Medical Associates,’ and Third-Party Defendant Hudson Valley Radiology Associates, PLLC, from the main action, on the grounds that (1) Discovery was complete in the main action before the Third-Party action was even commenced; (2) the main action is upon the trial calendar and discovery in the Third-Party action has not even begun; (3) Defendant-Third-Party Plaintiff had ample opportunity to commence the Third-Party action while discovery in the main action was still pending but inexcusably delayed doing so for more than a year without just cause; and (4) severance would alleviate inconvenience and unfair delay to the plaintiff, and unnecessary costs to

be incurred by all parties in this action; and b) Together with such other, further and different relief as this Court may deem just and proper in the premises.”

Notice of Motion; Affirmation in Support (NYSCEF Docs.43-44)
Affirmation in Opposition; Exhibits A-D (NYSCEF Docs.48-56)
Reply Affirmation (NYSCEF Doc.57)
Letter (NYSCEF Doc. 75)
NYSCEF Record

The following papers were read on this Cross-Motion (Seq. No. 3) by Third-Party Defendant, Emergency Medical Association of New York, P.C. s/h/a as Emergency Medical Associates “for an order, pursuant to CPLR §1010 and §603: (1) severing the third-party action brought by defendant/third-party plaintiff Montefiore Nyack Hospital against third-party defendant Emergency Medical Association of New York, P.C. incorrectly s/h/a ‘Emergency Medical Associates’; or (2) granting third-party defendant Emergency Medical Association of New York P.C. incorrectly s/h/a ‘Emergency Medical Associates’ additional time to conduct discovery in the third-party action; and (3) granting such other and further relief as this Court may deem just and proper.”

Notice of Cross-Motion; Affirmation in Support; Exhibit A
(NYSCEF Docs.58-60)
Affirmation in Opposition to Cross-Motion (NYSCEF Doc.65)
Plaintiff’s Affirmation in Partial Opposition to Cross-Motion (NYSCEF Doc.71)
Amended Affirmation in Opposition to Cross-Motion (NYSCEF Doc.77)
NYSCEF Record

The following papers were read on this Cross-Motion (Seq. No. 4) by Third-Party Defendant, Hudson Valley Radiology Associates, PLLC “for an Order: a. Pursuant to CPLR §1010 and CPLR §603 severing the Third-Party action brought by Defendant/Third-Party Plaintiff Monefiore Nyack Hospital; b. For such other and further relief as this Court may deem just and proper.”

Notice of Cross-Motion; Affirmation in Support; Exhibits A-B
(NYSCEF Docs.66-69)
Affirmation in Opposition to Cross-Motion (NYSCEF Doc.72)
Affirmation in Reply (NYSCEF Doc.73)
NYSCEF Record

Upon the foregoing papers, these motions are determined as follows:

Plaintiff commenced this medical malpractice action against Defendant, Montefiore Nyack

Hospital (“Hospital”) by the filing of a Summons and Complaint on July 7, 2018. Issue was joined by the filing of the Hospital’s Answer on September 4, 2018. This action arises out of an emergency room visit to the Hospital by Plaintiff’s decedent, Kenneth Donoghue, after he was hit by a car. Plaintiff’s decedent was admitted to the Hospital under the care of an emergency room physician, Jason Alejandro, M.D. Another emergency room physician, Aisha Stroop, M.D., and a physician’s assistant, Rachel Unger, P.A. were also involved in the decedent’s care and treatment at the Hospital. The decedent was then transferred by ambulance to the Westchester Medical Center. Plaintiff contends that the Hospital, by and through the health care providers who cared for the decedent, failed to timely and adequately appreciate the significance of decedent’s injuries. Plaintiff contends that the Hospital failed to timely diagnose and treat the decedent for internal bleeding and a hematoma. Plaintiff alleges that by the time the decedent arrived at the Westchester Medical Center, the hematoma had grown so large that he went into respiratory and cardiac distress and passed away.

Plaintiff, decedent’s widow, was deposed on March 5, 2019. The emergency room physician, Jason Alejandro, M.D., was deposed as a non-party on June 24, 2019. On or before July 10, 2019, all discovery had been completed between the parties in the main action. Plaintiff filed a Note of Issue and Certificate of Readiness on September 5, 2019. On December 27, 2019, the Hospital filed a Third-Party Summons and Complaint. On January 21, 2020, Third-Party Defendant, Emergency Medical Association of NY, s/h/a as Emergency Medical Associates (“EMA”), served an Answer to the Third-Party Complaint and discovery demands. On February 19, 2020, Third-Party Defendant, Hudson Valley Radiology Associates, PLLC, (“HVRA”) appeared and answered the Third-Party Complaint.

Plaintiff now moves to sever the Third-Party action. Plaintiff complains that the Hospital knew of the existence of the Third-Party Defendants since the commencement of the action because it contracted with them to provide hospital services and personnel to staff various hospital departments. Plaintiff argues that notwithstanding any contractual arrangements, the Hospital had a duty to provide reasonable care to Plaintiff’s decedent, whether by its own employees or by contract agents supplied by a third party vendor. Plaintiff asserts that the Third-Party Defendants will be prejudiced if the Third-Party action is not severed, since all discovery in the main action has been completed and the Third-Party Defendants have had no opportunity to conduct discovery. Plaintiff points out that the Third-Party action was commenced seventeen (17) months after the main action was commenced and that the main action is ready for trial. Plaintiff notes, by letter to the Court, that Plaintiff is eighty-seven (87) years old and is entitled to a trial preference due to her age.

In response, Defendant Hospital argues, inter alia, that there are common questions of law and facts involved in the main action and the Third-Party action that warrant a denial of the motion to sever the Third-Party action since both actions sound in medical malpractice, involving the same parties and facts. Defendant Hospital claims that the motion to sever should be denied, as the discovery sought in the Third-Party action will be “nominal” and not significantly delay the main action.

Both Third-Party Defendants move for a severance and assert that since the Third-Party action has just recently been commenced, they have not had a full and fair opportunity to complete discovery. For example, EMA disputes the Hospital's claim that only "nominal" discovery is required in the Third-Party action and reports that EMA will need to take the deposition of Plaintiff and at least one nurse, and possibly more, from the Hospital. EMA adds that it will require the depositions of several doctors including, Dr. Schwartz, Dr. Setlik, Dr. Oppenheim, Dr. Fleischer; Dr. Rhee, and Dr. Reilly, who possess information relevant to EMA's defense of the Third-Party action. EMA argues that the lateness in commencing the Third-Party action is "shocking."

Motions to sever should be granted sparingly (*see Shanley v Callahan Industries, Inc.*, 54 NY2d 52, 57 [1981]). Nevertheless, CPLR 603 provides the court with discretion to order severance when doing so will avoid prejudice (Vincent C. Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, CPLR 603). Courts have discretion to balance the equities in deciding whether to grant a motion for severance (*Rosenbaum v Dane & Murphy, Inc.*, 189 AD2d 760 [1993]). Even where the main action and the third party action share common questions of law and fact, severance is appropriate when the main action is ready to proceed to trial for a resolution and discovery in the third-party action is incomplete due to a delay in the commencement of the third-party action (*see Abreo v Baez*, 29 AD3d 833 [2006]). In such cases, where there is no reasonable justification for a delay in bringing the third party action, it is a proper exercise of trial court discretion to sever the actions (*Singh v Piccolo*, 161 AD2d 698 [1990]; *Ambriano v Bowman*, 245 AD2d 404 [1997]).

Here, not only is discovery in the main action complete, but a Note of Issue was filed more than three (3) months prior to the commencement of the Third-Party action. Defendant Hospital has failed to offer any reasonable justification for its inordinate and substantial delay in commencing the Third-Party action. Although Defendant Hospital argues that Plaintiff is to blame for the delay in commencing the Third-Party action, it is clear that the fault lies squarely with Defendant Hospital. The newly added Third-Party Defendants' identities were contained within Hospital Defendant's records. It was known that Dr. Alexander, Dr. Stroop and PA Unger were employed by EMA. It was known that the radiologists who performed the CT scans were employed by HVRA. The contracts at issue between the Hospital and EMA and HVRA at the time of plaintiff's treatment were in Defendant Hospital's possession and had been in effect since 2017. Further, Dr. Alexander's testimony confirmed these contractual relationships. While Defendant Hospital complains that its counsel had numerous conversations with Plaintiff's counsel encouraging him to bring in EMA and HVRA as parties, Defendant Hospital has failed to allege, much less explain, a reasonable justification for Defendant Hospital's own delay for over seventeen (17) months after the action was commenced to commence the Third-Party action.

Defendant Hospital's conclusory assertion that discovery in the Third-Party action would be nominal is disingenuous at best. Third-Party Defendants are entitled to conduct their own depositions and pursue discovery in this action in order to defend the claims against them. Any inconvenience to Defendant Hospital occasioned by severance is outweighed by the potential for prejudice to Third-Party Defendants if deprived of their ability to engage in meaningful discovery. Moreover, it is without question that Plaintiff would suffer great prejudice, at eighty-seven (87)

years old, to wait for trial due to the stalling by Defendant Hospital. In light of the foregoing, and in order to prevent significant prejudice to Plaintiff and Third-Party Defendants, it is appropriate to sever the Third-Party action from the main action. In the event that the parties complete discovery in the severed action in a timely manner, the parties may make an application to join the matters for trial.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

In view of the foregoing, it is

ORDERED that the motions by Plaintiff and Third-Party Defendants are granted to the extent that the Third-Party action is severed; and it is further

ORDERED that on or before June 1, 2020 counsel for Defendant Hospital is directed to file an RJI and pay the RJI fee in the new action, provide the County Clerk's Office with a copy of this Order, and request that a new index number be issued. The County Clerk is directed to issue a new index number for the new action at no additional charge; and it is further

ORDERED that any applications not decided are herewith denied; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry upon counsel for all parties within fifteen (15) days of entry.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
May 8, 2020


HON. ROBERT M. BERLINER, J.S.C.

TO:
Service upon all counsel via NYSCEF