

Alsaud v Gomez

2023 NY Slip Op 30299(U)

January 27, 2023

Supreme Court, New York County

Docket Number: Index No. 157779/2021

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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NORAH ALSAUD,

Plaintiff,

- v -

CHIOMA OKAFOR-MBAH GOMEZ, M.D., KASHIF
RAMZAN, M.D., "EAST 50TH URGENT CARE," "EAST
67TH URGENT CARE," SUMMIT HEALTH MANAGEMENT,
LLC, CITY MEDICAL OF UPPER EAST SIDE PLLC, and
"CITY MD,"

Defendants.

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INDEX NO. 157779/2021
MOTION DATE 11/16/2022
MOTION SEQ. NO. 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 67, 68

were read on this motion to/for DISMISSAL/X-MOT CONSOLIDATION.

In this action to recover damages for medical malpractice and lack of informed consent (the 2021 action), the defendants "East 50th Urgent Care," "East 67th Urgent Care," City Medical of Upper East Side, PLLC, and "City MD" move pursuant to CPLR 3211(a)(4) to dismiss the complaint against them on the ground that there is a prior action pending against them for the same relief. The plaintiff opposes the motion, and cross-moves pursuant to CPLR 602 to consolidate this action into a malpractice action entitled *Norah Alsaud v City Medical of Columbus Circle, PLLC, et ano.*, pending in the Supreme Court, New York County under Index No. 805232/2019 (the 2019 action). The motion to dismiss is denied. The cross motion to consolidate is granted.

In the 2019 action, the plaintiff named City Medical of Columbus Circle, PLLC (CMCC), and "City MD" as defendants, alleging that CMCC, a professional limited liability company, maintained a medical clinic at 315 West 57th Street in Manhattan that was doing business as City MD. She asserted that, beginning on March 9, 2019, CMCC committed medical

malpractice in the treatment that its health-care personnel rendered to her, and failed to obtain her fully informed consent to the procedures that it performed. In her bill of particulars in the 2019 action, the plaintiff asserted that CMCC failed properly and timely to diagnose streptococcus-A infection, thus causing her to suffer from bacteremia and septic arthritis. In the 2021 action, the plaintiff named several individual practitioners and entities as defendants, including City Medical of Upper East Side, PLLC (CMUES), and “City MD.” In her 2021 complaint, she alleged that CMUES owned and operated a facility at 1150 Third Avenue in Manhattan, in addition to the facility at West 57th Street, and that “City MD” owned and operated both the Third Avenue and West 57th Street facilities. She further alleged that all of the defendants committed malpractice beginning on March 9, 2019 and March 11, 2019, and failed to obtain her fully informed consent to the procedures they performed or the administration of drugs that they provided.

The movants asserted that the 2019 action constituted a prior action pending against them for the same relief that the plaintiff sought in the 2021 action. In opposition, the plaintiff alleged that CMCC, which was named in the 2019 action, and CMUES, which was named in the 2021 action, were separate professional limited liability companies and, thus, separate legal entities that both operated under the name City MD. She further asserted that the medical staff at both City MD locations failed to diagnose and treat streptococcus-A infection, causing her to sustain infection in her shoulder, wrist, knee, and ankle, which required multiple arthroscopic irrigations, aspirations, and extensive arthroscopic debridement of three compartments of her knee, along with a synovectomy, chondroplasty, and a synovial biopsy, all of which were performed on March 26, 2019 at Lenox Hill Hospital. The plaintiff pointed out that the 2019 complaint focused on her March 9, 2019 treatment at CMCC’s West 57th Street facility, while the 2021 complaint focused on the March 11, 2019 treatment at CMUES’s Third Avenue facility. In addition, the plaintiff alleged that the defendant Summit Health Management, LLC, is a

relatively new entity that had been created by the merger of CMUES with Summit Medical Group.

Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed on the ground that another action is pending for the same relief, particularly where there is substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same (*see Whitney v Whitney*, 57 NY2d 731 [1982]; *Clark v Clark*, 93 AD3d 812 [2d Dept 2012]). With respect to the issue of whether there actually is a “pending action . . . for the same cause of action” (CPLR 3211[a][4]), if the relief sought in the later action is different than that sought in the pending action, the complaint in the later-filed action should not be dismissed, even where the parties are the same (*see Parker v Rich*, 140 AD2d 177 [1st Dept 1988]).

The allegations in the two actions refer to and describe similar, albeit distinct, tortious conduct by several different defendants, resulting in separate incidents involving the plaintiff and her course of treatment, as well as distinct damages arising from each failure to diagnose and properly treat her infection. The plaintiff essentially seeks “different damages” for “different wrongs” (*Singe v Bates Troy, Inc.*, 206 AD3d 1528, 1531 [3d Dept 2022]; *Feldman v Harari*, 183 AD3d 629, 631 [2d Dept 2020]). Hence, “[although] the causes of action in both suits arise out of the same subject matter or series of alleged wrongs, there is good reason for the separate existence of the earlier cause of action . . . since the nature of the relief sought is not the same or substantially the same” as that sought in the later-commenced action (*Boyer v New York Prop. Ins. Underwriting Assn.*, 120 AD2d 363, 363 [1st Dept 1986], quoting *Kent Dev. Co. v Liccione*, 37 NY2d 899, 901 [1975]).

Under the circumstances presented here, dismissal thus is not warranted. Rather, it is instead appropriate to consolidate the 2021 action into the 2019 action (*see Gutman v Klein*, 26 AD3d 464, 465 [2d Dept 2006]; *Fay Estates v Toys “R” Us, Inc.*, 22 AD3d 712, 713-714 [2d Dept 2005]; *Nasir v New York Univ. Hosps. Ctr.*, 2018 NY Slip Op 30363[U], *2-3, 2018 NY Misc

LEXIS 716, *2-3 [Sup Ct, N.Y. County, Feb. 27, 2018]; see also *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]).

“Consolidation is generally favored in the interest of judicial economy and ease of decision-making where cases present common questions of law and fact, ‘unless the party opposing the motion demonstrates that a consolidation will prejudice a substantial right’” (*Raboy v McCrory Corp.*, 210 AD2d 145, 147 [1st Dept 1994] quoting *Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]). In addition, consolidation “will avoid unnecessary duplication of proceedings, save unnecessary costs and expenses and prevent the injustice which would result from divergent decisions based on the same facts” (*Mas-Edwards v Ultimate Servs., Inc.*, 45 AD3d 540, 540 [2d Dept 2007]),

Where, as here, the two actions arise from one course of medical treatment rendered to the same plaintiff by different defendants on different dates, they clearly present common questions of law and fact (see CPLR 602; *Lecorps v Bromberg*, 127 AD3d 931, 932 [2d Dept 2015]; *Ciafone v New York Univ. Med. Ctr.*, 35 AD3d 780, 783-784 [2d Dept 2006]; *Prout v NYU Hosps. Ctr.*, 2021 NY Slip Op 30226[U], 2021 NY Misc LEXIS 296 [Sup Ct, N.Y. County, Jan. 21, 2021] [Kelley, J.]; see also *DeSilva v Plot Realty, LLC*, 85 AD3d 422 [1st Dept 2011]; *Kern v Shandell, Blitz, Blitz & Bookson*, 58 AD3d 487 [1st Dept 2009]). Moreover, there is no indication that consolidation will prejudice any substantial right or delay the completion of discovery and the schedule for filing the note of issue (see *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]), as discovery remains in the very early stages in both actions.

In light of the foregoing, it is

ORDERED that the motion of the defendants “East 50th Urgent Care,” “East 67th Urgent Care,” City Medical of Upper East Side, PLLC, and “City MD” to dismiss the complaint insofar as asserted against them is denied; and it is further,

ORDERED that plaintiff’s cross motion to consolidate this action with the action entitled

Alsaud v City Medical of Columbus Circle, PLLC, pending in the Supreme Court, New York County under Index No. 805232/2019, is granted, and the two actions are consolidated for all purposes in the Supreme Court, New York County, under Index No. 805232/2019, and it is further,

ORDERED that, within 20 days of the entry of this order, the plaintiff shall serve a copy of this order with notice of entry upon all other parties, the New York County Clerk, as Clerk of the Supreme Court, New York County, and the Trial Support Office of the Supreme Court, New York County, 60 Centre Street, Room 148, New York, New York 10007, and shall file the notice required by CPLR 8019(c) in a completed Form EF-22 with the New York County Clerk; and it is further,

ORDERED that, upon the plaintiff’s compliance with the directives set forth above, this action, entitled *Norah Alsaud v Chioma Okafor-Mbah Gomez, M.D., et al.*, pending in the Supreme Court, New York County, under Index No. 157779/2021, shall be and hereby is fully consolidated into the action entitled *Norah Alsaud v City Medical of Columbus Circle, PLLC, et ano.*, pending in the Supreme Court, New York County under Index No. 805232/2019, the consolidated action shall proceed under New York County Index No. 805232/2019, and, upon completion of discovery, the plaintiff shall only be required to file one note of issue in connection with the consolidated action; and it is further,

ORDERED that the caption of the consolidated action shall now read as follows:

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NORAH ALSAUD,

Plaintiff,

v

Index No. 805232/2019

CITY MEDICAL OF COLUMBUS CIRCLE,
PLLC, CITY MD, CHIOMA OKAFOR-MBAH
GOMEZ, M.D., KASHIF RAMZAN, M.D.,
EAST 50TH URGENT CARE, EAST 67TH
URGENT CARE, SUMMIT HEALTH
MANAGEMENT, LLC, and CITY MEDICAL

OF UPPER EAST SIDE, PLLC,
Defendants.
-----X;

and it is further,

ORDERED that, upon the plaintiff's compliance with the directives set forth above, the Trial Support Office and the New York County Clerk's Office shall amend their records accordingly.

This constitutes the Decision and Order of the court.

1/27/2023
DATE


JOHN J. KELLEY, J.S.C.

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| MOTION: | <input checked="" type="checkbox"/> | CASE DISPOSED | | <input type="checkbox"/> | NON-FINAL DISPOSITION | | | |
| | <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | | <input type="checkbox"/> | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |
| CROSS MOTION: | <input checked="" type="checkbox"/> | CASE DISPOSED | | | <input type="checkbox"/> | NON-FINAL DISPOSITION | | |
| | <input checked="" type="checkbox"/> | GRANTED | <input type="checkbox"/> | DENIED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> | OTHER |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | | | <input type="checkbox"/> | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |
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