

**Galbraith v 305 W. End Ave. Operating, LLC**

2023 NY Slip Op 32901(U)

August 21, 2023

Supreme Court, New York County

Docket Number: Index No. 805093/2022

Judge: John J. Kelley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

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*

-----X

CHRISTINA GALBRAITH, JOHN GALBRAITH, and EVAN  
G. GALBRAITH, III, as Co-Executors of the Estate of MARIE  
GALBRAITH,

Plaintiffs,

- v -

305 WEST END AVENUE OPERATING, LLC, ANDREW  
LYONS, M.D., LYONS MEDICAL CARE, PLLC, and CARLO  
BAYRAKDARIAN, M.D.,

Defendants.

-----X

**INDEX NO. 805093/2022**  
**MOTION DATE 05/05/2023**  
**MOTION SEQ. NO. 001**

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

In this action to recover damages for medical malpractice, negligence, negligence per se, and breach of contract, the plaintiffs move pursuant to CPLR 602 to consolidate an action entitled *Christina Galbraith, et al., as Co-Executors of the Estate of Marie Galbraith v Constellation Home Care, LLC*, pending in the Supreme Court, New York County, under Index No. 805368/2022 (Action No. 2) with the instant action (Action No. 1) and pursuant to CPLR 305(c) for leave to amend the caption accordingly. No party opposes the motion. The motion is granted upon the condition that the plaintiffs file a Request for Judicial Intervention (RJI) with the New York County Clerk and pay the appropriate RJI filing fee in connection with the action commenced under Index No. 805368/2022.

The plaintiffs commenced Action No. 1 on March 16, 2022. They alleged in the complaint filed in Action No. 1 that the defendant 305 West End Avenue Operating, LLC (305 West End), negligently rendered nursing and assisted living services to their decedent from May 2019 through February 6, 2020, while she was a resident at their facility, thus causing her to

develop ulcerative bed sores while she remained alive during that period of time, as well as employing “chemical restraints” upon the decedent rather than providing sufficient staff to provide physical restraints to treat the decedent when she became agitated. The plaintiffs further alleged that this facility committed negligence per se by violating statutes that regulate the operation of nursing homes and assisted living facilities, and breached the decedent’s contract of admission by failing to provide the services promised therein. The complaint further alleged that the defendants Andrew Lyons, M.D., his medical practice Lyons Medical Care, PLLC, and Carlos Bayrakdarian, M.D., all committed medical malpractice in caring for the decedent, specifically with respect to the pressure sores and treatment for agitation. On November 11, 2022, the plaintiffs commenced Action No. 2 against Constellation Home Care, LLC (Constellation), alleging, that, while their decedent resided in the facility operated by 305 West End---specifically between September 25, 2019 and December 30, 2019---Constellation negligently provided health-care services, thus committing medical malpractice, common-law negligence, and negligence per se for violation of statutory directives governing health-care entities that provide services in nursing homes and assisted-living facilities.

The plaintiffs now seek fully to consolidate Action No. 2 into Action No. 1. “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 [1st Dept 1994], quoting *Amtorg Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept 1993]). Consolidation of Action No. 2 into Action No. 1 is warranted. These two actions arise from the same events, the claims are made on behalf of the same plaintiff, and they clearly present common questions of law and fact (see CPLR 602; *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]), particularly because no party opposed the motion.

Nonetheless, 22 NYCRR 202.6(a) provides, in relevant part, that, with certain exceptions not relevant here, “in an action not yet assigned to a judge, the court shall not accept for filing a notice of motion . . . unless such notice or application is accompanied by a request for judicial intervention.” CPLR 8020(a) requires that, before a civil action is assigned to a judge or justice, the party seeking the assignment must pay the clerk of the court a fee of \$95 along with the filing of the RJI. Even though the papers in support of the instant motion were uploaded to the NYSCEF system under Action No. 1, in which an RJI fee has been paid and an RJI has been filed, relief is also requested that affects Action No. 2, which was commenced under Index No. 805368/2022, for which no RJI has yet been filed and no RJI fee has yet been paid. Thus, the filing of a separate RJI and the payment of the appropriate fee is required before this court may consolidate Action No. 2 into Action No. 1.

Accordingly, it is

ORDERED that motion is granted to the extent that the plaintiffs are directed, within 20 days of the entry of this order, to file a request for judicial intervention with the Clerk of the Supreme Court, New York County, and pay the appropriate fee, in connection with the action entitled *Christina Galbraith, et al., as Co-Executors of the Estate of Marie Galbraith v Constellation Home Care, LLC*, pending in the Supreme Court, New York County, under Index No. 805368/2022, upon which the motion seeking fully to consolidate Action No. 2 into Action No. 1 shall be granted, and Action No. 2 thereupon shall be fully consolidated into Action No. 1; and it is further,

ORDERED that the plaintiffs, upon filing said request for judicial intervention and paying the appropriate fee, shall thereafter serve a copy of this order with notice of entry upon all other

parties, the Clerk of the Supreme Court, New York County, and the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall file the notice required by CPLR 8019(c) and a completed Form EF-22 with the New York County Clerk's office; and it is further,

ORDERED that, upon the plaintiffs' compliance with the directives set forth above, the action entitled *Christina Galbraith, et al., as Co-Executors of the Estate of Marie Galbraith v Constellation Home Care, LLC*, pending in the Supreme Court, New York County, under Index No. 805368/2022 shall be fully consolidated into the action entitled *Christina Galbraith, et al., as Co-Executors of the Estate of Marie Galbraith v 305 West End Avenue Operating, LLC, et al.*, pending in the Supreme Court, New York County, under Index No. 805093/2022, the consolidated action shall proceed under New York County Index No. 805093/2022, 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 read as follows:

-----  
CHRISTINA GALBRAITH, JOHN GALBRAITH, and EVAN G. GALBRAITH, III, as Co-Executors of the Estate of MARIE GALBRAITH,

Plaintiffs,

Index No. 805093/2022

v

305 WEST END AVENUE OPERATING, LLC, ANDREW LYONS, M.D., LYONS MEDICAL CARE, PLLC, CARLO BAYRAKDARIAN, M.D., and CONSTELLATION HOME CARE, LLC,

Defendants.  
-----;

and, 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.

8/21/2023

DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE