

Banker v Scherl

2026 NY Slip Op 31836(U)

April 27, 2026

Supreme Court, New York County

Docket Number: Index No. 800004/2022

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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SEAN B. BANKER and DANIELLE M. RADEL,

Plaintiffs,

- v -

ELLEN J. SCHERL, M.D., FABRIZIO A. MICHELASSI, M.D.,
NEW YORK-PRESBYTERIAN/WEILL CORNELL MEDICAL
CENTER, NEW YORK-PRESBYTERIAN HOSPITAL, and
THE JILL ROBERTS CENTER FOR INFLAMMATORY
BOWEL DISEASE,

Defendants.

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INDEX NO. 800004/2022
MOTION DATE 04/27/2026
MOTION SEQ. NO. 005

**DECISION + ORDER ON
MOTION AND ORDER OF
CONSOLIDATION**

The following e-filed documents, listed by NYSCEF document number (Motion 005) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86

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

In this action to recover damages for medical malpractice based on alleged departures from good and accepted medical practice and the defendants' alleged failure properly to generate and maintain medical and billing records, lack of informed consent, negligent hiring, training, supervision, and retention of healthcare personnel, and loss of spousal consortium, the defendants move pursuant to CPLR 602 to fully consolidate, into the instant action (Action No. 1), a related action entitled *Banker, et ano. v Novitsky, et al.*, pending in the Supreme Court, New York County, under Index No. 100956/2025 (Action No. 2), and pursuant to CPLR 3025(b) for leave to amend the caption of the consolidated action accordingly. The plaintiffs oppose the motion. The motion is granted, Action No. 2 is fully consolidated for all purposes into Action No. 1 under Index No. 800004/2022, only one note of issue shall be required to place the consolidated action on the trial calendar, and the caption is amended accordingly.

On November 25, 2022, the plaintiffs commenced Action No. 1 against Ellen J. Scherl, M.D., Fabrizio A. Michelassi, M.D., New York-Presbyterian/Weill Cornell Medical Center

(NYPH/Weill), New York Presbyterian Hospital (NYPH), and the Jill Roberts Cener for Inflammatory Bowel Disease (JRC; collectively the NYPH defendants), alleging that, between April 23, 2010 until February 26, 2021, gastroenterologist Scherl committed malpractice in the course of providing gastroenterological care to Banker, thereby injuring him, that surgical oncologist and gastroenterologist Michellasi also committed malpractice while rendering treatment to Banker from February 5, 2019 until November 20, 2019, thus causing injury to Banker, and that NYPH/Weill, NYPH, and JRC committed malpractice and caused injury to Banker while providing treatment to him from April 23, 2010 until October 13, 2021. The plaintiffs also alleged that the defendants

“repeatedly misrepresented and willfully failed to disclose, report, and amend critical medical information and diagnostic errors of extreme consequence to plaintiff’s health and record, and continued to intentionally prevent disclosure or correction of this information to evade and mitigate their responsibility and error, while needlessly protracting the plaintiff’s suffering and creating further damage to his deteriorating condition and efforts to reclaim his health.”

In their bills of particulars addressed to the NYPH defendants, the plaintiffs specifically alleged that these defendants failed to diagnose Banker’s actual condition, performed nonindicated or contraindicated procedures, improperly performed the procedures that they determined to perform, thus leading to a failure fully and properly to close Banker’s surgical abdominal wound, failed to correct errors in diagnosis, and failed correctly to memorialize Banker’s actual condition or the course of his treatment in the relevant medical charts, requiring Banker to undergo additional surgical procedures, and suffer continuing pain and undue scarring. On March 15, 2024, the defendants served filed a request for judicial intervention (RJI) in Action No. 1.

On August 26, 2025, the plaintiffs commenced Action No. 2 against surgeon Yuri W. Novitsky, M.D., The New York and Presbyterian Hospital,¹ where Novitsky practiced medicine,

¹ In Action No. 2, the plaintiffs denominated an entity as The New York and Presbyterian Hospital, while in Action No. 1, they denominated an entity as New York-Presbyterian Hospital. To the extent that the latter may refer only to the hospital located on West 168th Street between Fort Washington Avenue and Broadway in Manhattan, while the former may refer to the totality of the entity created by the merger of

and The Trustees of Columbia University in the City of New York (Columbia), which oversees the Columbia University College of Physician and Surgeons, a medical school that is affiliated with NYPH, and allegedly asserted operational control over Columbia University Irving Medical Center and Columbia Doctors, which provided care and treatment to Banker. The plaintiffs alleged that Novitsky committed malpractice between July 24, 2019 and February 28, 2023 in the course of providing medical treatment to Banker, which overlapped with the care and treatment rendered by the defendants named in Action No. 1, thus causing or contributing to Banker's injuries, while both NYPH and Columbia committed malpractice between July 24, 2019 and February 18, 2025 in its treatment of Banker. Moreover specifically, the plaintiff sought to recover against Novitsky, NYPH, and Columbia for, among other things, an October 31, 2022 abdominal wall reconstruction procedure that Novitsky allegedly performed in a negligent fashion. The plaintiffs also asserted causes of action to recover against the defendants in Action No. 2 for lack of informed consent, breach of contract, negligent hiring, training, supervision, and retention of healthcare personnel, and loss of spousal consortium. As set forth in the plaintiffs' bills of particulars addressed to the defendants in Action No. 2, their alleged wrongdoing caused Banker to sustain

“respiratory and physiologic instability with findings consistent with mechanical and extrinsic restriction; fail to disclose the potential for a prolonged period of post-operative respiratory instability and physiologic distress, including sustained hypoventilation, impaired CO2 elimination, elevated shock index, recurrent oxygen desaturation, persistent sinus tachycardia, severe pain, along with substantial difficulty achieving full inspiration.”

On March 23, 2026, the plaintiffs served and filed an RJJ in connection with Action No. 2.

“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*

New York Presbyterian Hospital and Weill Cornell Medical Center, the court, upon consolidation, will separately enumerate each of those two monikers.

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]). Action No. 1 and Action No. 2 both arise from the same continuum of care rendered to Banker by three facilities over an essentially overlapping and continuous period of time, and 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]). There is no indication that consolidation will prejudice a substantial right of any party (see *Amcan Holdings, Inc. v Torys LLP*, 32 AD3d 337 [1st Dept 2006]). Moreover, the two actions that are the subject of this motion are essentially at the same phase of discovery since, although this court, in Action No. 1, has conducted five case management conferences, and issued five case management orders, depositions have yet to be conducted, with Banker's deposition not scheduled until June 26, 2026 and the deposition of the plaintiff Danielle M. Radel not scheduled to be conducted until July 24, 2026. Since the same law firm that is representing the defendants in Action No. 1 is also representing the defendants in Action No. 2, there will be no prejudice to the defendants. Moreover, the next discovery conference in Action No. 1 is scheduled for August 10, 2026, at which continuing discovery issues in the newly consolidated action may be resolved and new discovery deadlines may be fixed. Hence, the plaintiffs have not demonstrated any prejudice to themselves should the court grant the defendants' motion to fully consolidate the two actions.

As a general rule, a later-commenced action should be consolidated into an earlier-commenced action (see *DLJ Mtge. Capital, Inc. v Kontogiannis*, 110 AD3d 522, 523 [1st Dept 2013]; *Ali v Effron*, 106 AD3d 560, 560 [1st Dept 2013]; see generally *See City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49, 58 [1969]). Since the plaintiffs commenced Action No. 1 prior to Action No. 2, and the RJI in Action No. 1 was filed before the RJI was filed in Action No. 2, the consolidated action should proceed under the index number assigned to Action No. 1.

Accordingly, it is,

ORDERED that defendants' motion is granted, the action entitled *Banker, et ano. v Novitsky, et al.*, pending in the Supreme Court, New York County, IAS Part 56, under Index No. 100956/2025, is fully consolidated for all purposes into the action entitled *Banker, et ano. v Scherl, et al.*, pending in the Supreme Court, New York County, Part 56, under Index No. 800004/2022; and it is further,

ORDERED that the consolidated action shall proceed under New York County Index No. 800004/2022; and it is further,

ORDERED that, after the completion of discovery in the consolidated action, the plaintiffs shall be obligated to file only one note of issue in connection with the consolidated action under Index No. 800004/2022; and it is further,

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

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SEAN B. BANKER and DANIELLE M. RADEL,

Plaintiffs,

V

Index No. 800004/2022

**ELLEN J. SCHERL, M.D., FABRIZIO A. MICHELASSI, M.D.,
NEW YORK-PRESBYTERIAN/WEILL CORNELL MEDICAL
CENTER, NEW YORK-PRESBYTERIAN HOSPITAL, THE
JILL ROBERTS CENTER FOR INFLAMMATORY BOWEL
DISEASE, YURI W. NOVITSKY, M.D., THE NEW YORK AND
PRESBYTERIAN HOSPITAL, and THE TRUSTEES OF
COLUMBIA UNIVERSITY IN THE CITY OF NEW YORK,**

Defendants.

-----X;

and it is further,

ORDERED that, within 15 days of the entry of this order, the defendants shall serve a copy of this decision and order upon both the County Clerk and the Clerk of the General Clerk's Office with notice of entry, which shall be effectuated 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, and, to comply with those procedures, that defendants shall (1) upload the decision and order to the NYSCEF system under document title “SERVICE ON SUPREME COURT CLERK (GENL CLERK) W/COPY OF ORDER” **AND** (2) separately file and upload the notice required by CPLR 8019(c) in a completed Form EF-22, along with a copy of the decision and order, with notice of entry, under document title “NOTICE TO COUNTY CLERK CPLR 8019(C)”; and it is further,

ORDERED that, upon the defendants’ compliance with the directives set forth above, the Trial Support Office, the New York County Clerk’s Office, and all applicable court support offices shall amend their records accordingly, including amending the caption to reflect the complete consolidation of the actions, and marking “disposed” the action pending under Index No. 100956/2025.

This constitutes the Decision and Order and Order of Consolidation of the court.

4/27/2026
DATE



JOHN J. KELLEY, J.S.C.

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