

<b>Einheber v Bodenheimer</b>
2003 NY Slip Op 30251(U)
June 16, 2003
Supreme Court, New York County
Docket Number: 114682/01
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

**EILEEN BRANSTEN**  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 6

*Exhibits of ex Propria Persona*

INDEX NO. 114-682-01

MOTION DATE 4-15-03

- v -

*Modenheimer H. M.D.*

MOTION SEQ. NO. 02

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion to/for motion to consolidate

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED **SCANNED**

1	JUN 24 2003
2	
3	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM**

MOTION/CASE IS RESPECTFULLY REFERRED TO  
JUSTICE

Dated: 6-16-03

*Eileen Bransten*  
**EILEEN BRANSTEN**  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX

..... X

JACK EINHEBER, In Propria Persona,

-against-

Plaintiff,

Index No. 114682/01  
Motion Date: 4/15/03  
Motion Seq. Nos.: 02

HENRY BODENHEIMER, M.D., CHARLES MILLER,  
M.D., PATRICIA SHEINER, M.D., LEONA  
KIM-SCHLUGER, M.D., SUKRU EMRE, M.D.,  
THOMAS FISHBEIN, M.D., DR. BEN-HAIM, M.D.,  
CECILIA DAVID, R.N., LINDSAY ARNOTT, R.N.,  
UNKNOWN NAME PHYSICAL THERAPIST,  
MT. SINAI MEDICAL CENTER SURGICAL  
ASSOCIATES, MT. SINAI MEDICAL CENTER,  
DOES 1-100,

Defendants.

-----X

PRESENT: EILEEN BRANSTEN, J.

In this medical malpractice action, Henry Bodenheimer, M.D., Charles Miller, M.D., Patricia Sheiner, M.D., Leona Kim-Schluger, M.D., Sukru Emre, M.D., Thomas Fishbein, M.D., Dr. Ben-Haim, M.D., Cecilia David, R.N., Lindsay Arnott, R.N., Unknown Name Physical Therapist, Mt. Sinai Medical Center Surgical Associates and Mt. Sinai Medical Center (“Defendants”) move for an order pursuant to CPLR 602(a) consolidating three actions instituted under Index Nos. 114682/01, 120646/01 and 112073/02 that were brought by the same plaintiff against Mount Sinai Medical Center and its various affiliated centers, physicians and staff for the care and treatment received at Mount Sinai Hospital s/h/a Mount Sinai Medical Center (“Hospital”), between 1998 and 2000.

### BACKGROUND

Jack Einheber started treatment with the Defendants sometime prior to October 1996. Mr. Einheber underwent a liver transplant on February 1, 1999. He commenced three actions in Supreme Court New York County in which he alleges, among other things negligent, incompetent and wrongful medical treatment between 1998 and 2000. The allegations relate to various hospitalizations, the pre- and post-operative care of his liver transplant and kidney stones.

On August 1, 2001, Mr. Einheber, acting *pro se*, commenced this action bearing Index No. 114682/01 against the Defendants. Mr. Einheber served the Summons and Complaint on the Defendants on November 29, 2001, and on December 20, 2001 he served another Summons and an Amended Complaint. He subsequently served third Summons and a Second Amended Complaint on January 9, 2002. The Defendants moved for a more clarified pleading and Mr. Einheber served a clarified Complaint on June 29, 2002. In this action Mr. Einheber alleges, among other injuries, acute rejection of the transplanted liver, impaired lung function and acute atrophy of abdominal musculature.

On November 7, 2001, Mr. Einheber, again acting *pro se*, commenced a second action. This case bearing Index No. 120646/01, was brought against Alexander Kirschenbaum, M.D., Mt. Sinai Urological Associates, Mt. Sinai Medical Center and Does 1-100 who were served on March 2, 2002. In this action, Mr. Einheber complains of

urological problems resulting from malpractice during his postoperative care for the liver transplant. Mr. Einheber is now represented by Ms. Jacqueline Bukowski, Esq. in the matter.

On June 5, 2002, Mr. Einheber for a third time acting *pro se*, commenced yet another action. This case, bearing Index No. 112073/02, was brought against Eugene Fine, M.D., Sheldon Glabman, M.D., Anthony Squire, M.D., Dr. Sutton, M.D., Franklin Klion, M.D., Leona Kimschluger, M.D. (also a named defendant in the first action), Patricia Sheiner, M.D. (also a named defendant in the first action), Unknown Name Urology Resident Physician, Mt. Sinai School of Medicine Renal Diseases and Nephrology Associates, Mt. Sinai School of Medicine Cardiology Associates, Mt. Sinai School of Medicine Liver Diseases and Hepatology, Mt. Sinai Surgical Associates (also a named defendant in the first action), Mt. Sinai Medical Center (also a named defendant in the first and second actions) and Does 1-100. The claims in this case are also related to the alleged complications from the liver transplant and the subsequent kidney stones.

Defendants have now filed a motion to consolidate the three actions brought by Mr. Einheber against all of the defendants on the basis that the claims in the three actions arise from the same course of treatment at the Hospital under the care of its physicians. Defendants urge that at trial, common questions of law and fact will arise and everyone's time will be saved if these actions are tried as one. The Defendants further urge that the

consolidation of these actions will avoid multiplicity of lawsuits and serve judicial economy by disposing of issues without the necessity of three trials between the same parties based upon the same factual circumstances.

Mr. Einheber in his opposition papers indicates that the attorney representing him in the second action, Ms. Bukowski, would be unable to take on all three cases and that any attorney representing him in future might be discouraged from taking on the case because of the number of defendants in the consolidated action. Mr. Einheber nonetheless indicates that he has no opposition to consolidation of the actions where he is acting *pro se*.

#### ANALYSIS

Judges have discretion to consolidate actions where cases present common questions of fact and law, provided that there is no prejudice to the substantial rights of any of the parties. *See, J.P. Foodservice Distributors, Inc. v. PriceWaterhouseCoopers, LLP*, 291 A.D.2d 323 (1<sup>st</sup> Dep't 2002); *Morell v. Basa*, 300 A.D.2d 134 (1<sup>st</sup> Dep't 2002) and *Matter of New York County Des Litigation*, 277 A.D.2d 158 (1<sup>st</sup> Dep't 2000). Indeed, public policy favors consolidation in an appropriate case because consolidation, "is not only a saving in time, trouble, and expense to the parties and the state, but a preventive of the injustice which may result from divergent decisions in each separate case." *See, Shlansky & Bro. Inc. v. Grossman*, 273 App. Div. 544 (1st Dep't 1948); *Morell v. Basa, supra*, 300 A.D.2d at 135.

The burden of showing prejudice rests upon the party opposing consolidation. *See, vigo Steamship Corp. v. Marship Corp. of Monrovia*, 27 N.Y.2d 535 (1970), *cert. denied* 400 U.S. 819 (1970); *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64 (1st Dep't 2002). Moreover, while it is not necessary that all rules and all facts be common to both cases, there must at least be some important rules of law and some substantial issues of fact to be determined that are common to both actions in order for them to be consolidated. *See, Gibbons v. Groat*, 22 A.D.2d 996,997 (3d Dep't 1964).

In the instant case, the three actions brought by Mr. Einheber are all related to the course of treatment rendered at the Hospital between 1998 and 2000 for his liver disease and associated illnesses. The first action relates to the liver transplant, which took place at the Hospital. The second and the third actions are related to the urological complaints, which Mr. Einheber himself alleges were related to his immunocompromised state following the liver transplant and were purportedly the result of improper postoperative care at the Hospital. Additionally, even apart from the common course of treatment in the three actions, there is an overlap of several defendants. For example, Mt. Sinai Medical Center is named in all three actions and Dr. Kim-Schluger, Dr. Sheiner and Mt. Sinai Surgical Associates are named in the first and the third actions. It is clear from the record that Mr. Einheber's allegations in the various actions raise common questions of fact and law and the actions to some extent even share common parties.



Furthermore, here Mr. Einheber--the party opposing consolidation--has the burden of convincing the court that prejudice would result from joinder of the actions. Mr. Einheber, however, has not provided any concrete evidence that he would be prejudiced. Surprisingly, he has not presented an affirmation from Ms. Bukowski, his attorney in the second action, stating that she would be unable to continue if all of the actions were consolidated. In fact, Ms. Bukowski has already attended conferences before this Court in this first action. Mr. Einheber has only cited hypothetical hardships. He has not shown that a consolidated action would prejudice any right of his, let alone a substantial right. Based on the interrelationships of the actions (including common facts, issues and parties) and based on Mr. Einheber's failure to establish prejudice to a substantial right, the Defendants' motion to consolidate is granted.

Accordingly, it is

ORDERED that the Defendants' motion to consolidate is granted and the above-captioned action is consolidated in this Court with Jack Einheber v. Kirschenbaum bearing Index No. 120646/01 and with Jack Einheber v. Fine, et al bearing Index No. 112073/02, under Index No. 114682/01, and the consolidated action shall bear the following caption:



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART SIX-----X  
JACK EINHEBER, In Propria Persona,

Plaintiff,

Index No. 114682/01

-against-

HENRY BODENHEIMER, M.D., CHARLES MILLER, M.D.  
PATRICIA SHEINER, M.D., LEONA KIMSCHLUGER, M.D.,  
SUKRU EMRE, M.D., THOMAS FISHBEIN, M.D., DR. BEN  
HAIM, M.D., DR. KELLY, M.D., CECILIA DAVID, R.N.,  
LINDSAY ARNOTT, R.N., UNKNOWN NAME PHYSICAL  
THERAPIST, DOES 1-100, ALEXANDER KIRSCHENBAUM,  
M.D., DOES 1-100, EUGENE FINE, M.D., SHELDON  
GLABMAN, M.D., ANTHONY SQUIRE, M.D., DR. SUTTON,  
M.D., FRANKLIN KLION, M.D., UNKNOWN NAME UROLOGY  
RESIDENT PHYSICIAN, MT. SINAI SURGICAL ASSOCIATES,  
MT. SINAI UROLOGICAL ASSOCIATES, MT. SINAI SCHOOL  
OF MEDICINE RENAL DISEASES AND NEPHROLOGY  
ASSOCIATES, MT. SINAI SCHOOL OF MEDICINE  
CARDIOLOGY ASSOCIATES, MT. SINAI SCHOOL OF  
MEDICINE LIVER DISEASES AND HEPATOLOGY,  
MT. SINAI MEDICAL CENTER and DOES 1-100.

Defendants.

-----X  
It is furtherORDERED that the pleadings in the actions hereby consolidated shall stand as the  
pleadings in the consolidated action; and it is furtherORDERED that upon service on the Clerk of the Court of a copy of this order with  
notice of entry, the clerk shall consolidate the papers in the actions hereby consolidated

and shall mark his records to reflect the consolidation and the new caption; and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby respectfully directed to mark the Court's records to reflect the consolidation and the new caption.

This constitutes the decision and order of the court.

Dated: New York, New York  
June 16 2003.

ENTER

A handwritten signature in black ink on a light gray background. The signature is cursive and appears to read "Eileen Bransten".

Hon. Eileen Bransten