SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

BOBBY LOPEZ,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

MOTION INDEX NO. 805418/2017

MOTION DATE

MOTION SEQ. NO. 001

Cross-Motion: ☐ Yes ☑ No

Defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC" "defendant") moves to consolidate this medical malpractice action with a federal civil rights action also pending in the Supreme Court, New York County, entitled *Bobby Lopez and Jason Perez v. The City of New York et al* (Index No. 151467/2017) for joint trial and discovery, pursuant to CPLR § 602(a), and transfer the consolidated action to me, pursuant to an administrative order dated March 30, 2015 that directs all medical malpractice cases in which NYCHHC is a named defendant be assigned to me.

Plaintiff BOBBY LOPEZ ("plaintiff") opposes the application. For the reasons discussed below, the motion is granted.

BACKGROUND AND ARGUMENTS

On or about November 16, 2017, plaintiff alone commenced the instant medical malpractice action against NYCHHC. Jason Perez, the City of New York, and various police officers named in the federal civil rights action are not parties to the above-captioned case. Indeed, in the instant action, plaintiff primarily alleges that following his admission to Bellevue Hospital, a NYCHHC facility, the hospital and its employees failed to timely and properly treat and diagnose

his medical condition, including traumatic subdural hematoma, basilar skull fracture, and pneumothorax. A preliminary conference has yet to be held in the instant action.

In contrast, in the federal civil rights action, it is alleged that on August 16, 2016, police officers, acting in concert, assaulted and ultimately arrested plaintiff without cause at plaintiff and Mr. Perez's home located at 419 W 17th Street, New York, New York. Plaintiff was charged with criminal sale of marijuana and resisting arrest in violation of New York Penal Law ("PL") §§ 221.35 and 205.30, respectively. Mr. Perez was charged with criminal possession of marijuana in violation of PL § 221.10(1). It is alleged that neither plaintiff nor Mr. Perez possessed or sold marijuana at any point prior to their arrest. Eventually, plaintiff was transported to the hospital where he remained admitted for several days. Prosecutors eventually declined to prosecute plaintiff and Mr. Perez. On February 15, 2017, following the dismissal of the charges against them, plaintiff and Mr. Perez commenced the federal civil rights action against the City of New York and the police officers that had arrested them. The parties are in the preliminary stages of discovery in this action. Indeed, on or about February 2, 2018, plaintiff and Mr. Perez served the City and the police officers with a notice of deficiencies concerning their responses to discovery demands.

Defendant argues that the federal civil rights action should be consolidated with the instant action because both actions arise out of the same facts and circumstances. Specifically, defendant contends that common issues exist regarding the extent of which defendant, if any, is responsible for the alleged injuries plaintiff sustained as a result of the NYPD incident on August 16, 2016. In that regard, defendant avers that because plaintiff sought medical attention and underwent medical treatment at Bellevue Hospital for these alleged injuries, each defendant is entitled to make a case for apportionment of liability and damages. Defendant further asserts that consolidation will

promote judicial economy and consistent determinations as to the factual and legal issues since both actions are in the early stages of discovery and no depositions have been held.

In opposition, plaintiff argues that consolidation is inappropriate because the claims in each action are based upon widely disparate legal theories and require different measures of damages. Specifically, plaintiff alleges that the medical malpractice action is based on NYCHHC's failure to timely and properly diagnose and treat his medical condition, whereas the federal civil rights action involves the unlawful deprivation of his civil rights. Plaintiff further clarifies that there is no allegation in the medical malpractice action that NYCHHC directly caused any of the injuries related to his assault. Rather, plaintiff alleges that NYCHHC failed to timely diagnose and treat those injuries. Consequently, plaintiff asserts that a jury trying both cases at the same time would be confused.

DISCUSSION

"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 Amtora Trading Corp. v Broadway & 56th St. Assoc.*, 191 AD2d 212, 213 [1st Dept. 1993]). Here, defendant correctly argues that the actions discussed herein present common questions of law and fact (*see* CPLR § 602). Indeed, defendant points out that both lawsuits raise common questions concerning the cause and extent of plaintiff's alleged injuries (*Amaro v. Gani Realty Corp.*, 60 A.D.3d 491, 493 [1st Dept. 2009]; *Lamboy v. Inter Fence Co.*, 196 A.D.2d 705, 705 [1st Dept. 1993]; *Burger v. Long Island R. Co.*, 24 A.D.2d 509 [1st Dept. 1965]; *Tascio v. Citizens Bank of White Plains*, 254 A.D. 881, 881 [2d Dept. 1938]).

In *Melendez v. Presto Leasing*, the First Department held, "Although plaintiff's injuries arose from two separate accidents at separate locations and at different times in the two actions, respectively, consolidation or joint trial is appropriate since she had alleged similar injuries in each action" (161 A.D.2d 501, 501 [1st Dept. 1990]; *see also Richardson v. Uess Leasing Corp.*, 191 A.D.2d 394, 396 [1st Dept. 1993] [consolidation was appropriate although plaintiff's injuries arose from two separate accidents at separate locations and at different times since she had alleged similar injuries in each action]). Similarly, here, although plaintiff alleges that the police officers caused his initial injuries and as a result, he underwent medical treatment at Bellevue Hospital, several of his claimed injuries in both lawsuits are identical. For instance, plaintiff's verified bill of particulars in each action allege severe emotional distress, lower back pain, pain on the left side of the head, pain at the right shoulder and hand, left ear pain, pneumothorax, headaches, erythema of the ear, hearing loss, intermittent tinnitus, aural fullness, mastoiditis, and chest pain. Thus, although the two incidents occurred at separate locations and at different times, plaintiff's allegations of several identical injuries in each lawsuit "is sufficient to warrant [consolidation] and joint trial in order to avoid the possibility of inconsistent verdicts" (*id.*).

Moreover, the fact that each defendant may shift or apportion liability and/or damages to the other necessitates consolidation of the two actions. "[W]here 'it is apparent that part of the defense with respect to each accident will be that the other defendants are responsible for the plaintiff's injuries[,] a joint trial is indicated" (*Gage v. Travel Time & Tide, Inc.*, 161 A.D.2d 276, 277 [1st Dept. 1990] [consolidated and joined for trial two unrelated actions where the defendants each claimed that the other was responsible for extent of plaintiff's injuries]). In other words, "If the cases are tried separately each defendant will try to place the blame on the other for all or most of the injuries, and the plaintiffs might not be as completely protected as if they were tried together"

(*Thayer v. Collett*, 41 A.D.2d 581, 581 [3d Dept. 1973] [granted defendants' motion for a joint trial where "there was a common question of fact as to the extent to which each defendant might be responsible for the allegedly permanent injuries"] *citing Potter v. Clark*, 19 A.D.2d 585, 585 [4th Dept. 1963]). Accordingly, "One jury hearing all the evidence can better determine the extent to which each defendant caused plaintiff's injuries and should eliminate the possibility of inconsistent verdicts which might result from separate trials" (*id.*). Indeed, in the instant medical malpractice action, plaintiff alleges that NYCHHC failed to diagnose and treat the injuries caused by defendants in the first action. Although plaintiff does not allege that NYCHHC caused his injuries, the medical treatment he received at Bellevue Hospital that same day was the result of and directly connected to the earlier NYPD incident. Moreover, because some of the injuries enumerated in each lawsuit are identical, and because the causes of action and alleged injuries arose out of incidents occurring on the same day, it is unclear which defendant caused which injuries and when each injury occurred (*Dolce v. Jones*, 145 A.D.2d 594, 595 [2d Dept. 1988] [granting joint trial where the causes of action "share the common issue of which injuries were caused by the defendants" involved in each accident]). A joint trial is thus warranted to determine what injuries may have been caused by the police officers and which injuries, if any, may have been caused or exacerbated by NYCHHC (*Richardson*, 191 A.D.2d at 396, *supra* ["although there was no claim that the injuries sustained in the second accident aggravated those sustained in the first accident, consolidation is appropriate"]; *Gage,* 161 A.D.2d at 277, *supra* [granting consolidation where it was claimed that the injury in the second accident aggravated the injuries sustained in first accident]).

In that regard, plaintiff's argument that consolidation is inappropriate because each cause of action has a different measure of damage is unavailing. In granting consolidation of four actions,

the court in *Maurice Slater Trucking Co. v. Maus* held, "While it is true that in a death case[,] different principles of law are to be applied on the questions of contributory negligence *and damages* than those which are applicable in the case of an injured plaintiff, [...] these rules are not difficult of explanation or application" (70 N.Y.S.2d 828, 830 (Sup. Ct. 1947) [emphasis added]; *see generally Thayer*, 41 A.D.2d at 17, *supra* ["In granting a joint trial, it is not required that all questions of law or fact be common to the various actions."]). Here, while the federal civil rights action may require additional analyses of various constitutional violations and a determination of litigation costs, there is no showing that a jury would be unable to assess these issues or measure damages based on the facts and evidence presented. By contrast, consolidation would ensure that a single jury hearing the facts of both cases at the same time would properly apportion liability and damages among each defendant relative to their individual share of fault.

Furthermore, there has been no demonstration that consolidation may complicate or prejudice plaintiff's right to a fair trial or any other substantial right (*Progressive Ins. Co. v. Vasquez*, 10 A.D.3d 518, 519 [1st Dept. 2004]; *Zupich v. Flushing Hosp. & Med. Ctr.*, 156 A.D.2d 677, 677 [1st Dept. 1989] [consolidation should be granted unless the opposing party succeeds in demonstrating prejudice to a substantial right]; *Dolce*, 145 A.D.2d at 595, *supra*). It is immaterial that plaintiff's federal civil rights action alleges deprivation of his constitutional rights, as the crux of these underlying claims sounds in negligence and seeks damages for the tortious acts committed by the police officers and the police department. Indeed, plaintiff's complaint in this action alleges various torts including negligent and intentional infliction of emotional distress, negligent hiring, training, supervision and retention of employment services, and negligence and/or breach of a special duty or relationship (*see e.g. Williams v. City of New York*, 191 A.D.2d 217, 218 [1st Dept. 1993] [granting consolidation where "the issues of negligence and deviation from proper medical

care are not so complex as to be confusing to a jury; thus we perceive no risk of prejudice"]; *Zupich,* 156 A.D.2d at 677, *supra* [granting consolidation of a medical malpractice action and an action to recover damages for negligence]; *Hill v. Smalls*, 49 A.D.2d 724, 724 [1st Dept. 1975] [granting joint trial although the actions arose out of unrelated accidents]). Because there is no suggestion that a jury would be confused by the issues presented in the federal civil rights action and the medical malpractice action, consolidation is therefore warranted.

Moreover, the interest of judicial economy dictates that the two actions here should be joined for trial and discovery. For instance, both actions are in similar stages of litigation. (*Bernstein v. Silverman*, 228 A.D.2d 325, 325-326 [1st Dept. 1996]) [consolidation granted where "both actions are in the early stages of discovery and will not be unduly delayed if consolidated"]). Specifically, a preliminary conference has yet to be held in the instant action and the City and the police officers have yet to correct any deficiencies concerning their responses to discovery demands in the federal civil rights action. More importantly, no depositions have been held in either action. Because defendant has established that consolidation of the actions would promote judicial economy and consistent jury determinations, the two actions are joined for trial and discovery. As such, it is hereby

ORDERED that defendant's motion to have the federal civil rights action consolidated with the instant action for joint trial and discovery is granted in full; and it is further

ORDERED that the federal civils rights action and the instant action shall proceed under two separate captions; and it is further

ORDERED that the clerk is directed to transfer the consolidated action bearing Index No. 151467/2017 to me, pursuant to an administrative order directing the same; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on June 26, 2018 at 9:30 A.M. at 111 Centre Street, Room 1227 (Part 10) New York, New York 10013 to ensure compliance with this court's order and to further facilitate discovery.

This constitutes the decision and order of the court.

Dated: June 1, 2018

HON. GEORGE J. SILVER

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION