

Estate of Savage v Kredentser
2018 NY Slip Op 31268(U)
April 20, 2018
Supreme Court, Albany County
Docket Number: 900156-2015
Judge: Gerald William Connolly
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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

 ORIGINAL

ESTATE OF JOYCE SAVAGE, HOWARD ALVIN
SAVAGE, INDIVIDUALLY AND AS THE ESTATE
REPRESENTATIVE,

DECISION AND ORDER
Index No.: 900156-2015
RJI No.: 01-15-117128

Plaintiffs,

-against-

DR. DANIEL C. KREDENTSER, WOMEN'S
CANCER CARE ASSOCIATES, LLC, ST. PETER'S
HOSPITAL CENTER OF THE CITY OF ALBANY,
INC., ST. PETER'S NURSING AND REHABILITATION
CENTER, INC. and JOHN DOES 1 THROUGH 50,

Defendants.

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(Supreme Court, Albany County, All Purpose Term)

APPEARANCES: Denise L. Savage, Esq.
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Connolly, J.:

Defendants St. Peter's Hospital Center of the City of Albany, Inc. and St. Peter's Nursing and Rehabilitation Center, Inc. (the "St. Peter's Defendants") and Dr. Daniel C. Kredentser and Women's Cancer Center Associates, LLC (collectively, the Kredentser Defendants) have each moved for an order granting leave to amend their Answers pursuant to CPLR §3205(b), dismissing the complaint pursuant to CPLR §3211(a)(4), and awarding costs pursuant to 22 NYCRR §130-1.1 in this medical malpractice action.

The plaintiffs commenced this action by the filing of a summons and complaint on February 10, 2015 which complaint was amended on February 26, 2015. The Amended Complaint seeks to recover monetary damages for personal injuries sustained by Joyce Savage (the "Decedent") as a result of alleged medical malpractice committed by Dr. Kredentser and Women's Cancer Care Associates, LLC between August 8, 2011 and August 24, 2011.

Defendants argue that they are entitled to dismissal of the action as against them pursuant to CPLR §3211(a)(4) on the ground that almost three years after commencing the instant action, on December 18, 2017, plaintiffs commenced another action in the United States District Court for the Northern District of New York between the same parties for the same cause via the filing of a Summons and Complaint seeking damages for personal injuries of plaintiffs' decedent and derivative losses allegedly sustained by the plaintiffs resulting from the same debulking surgery performed by defendant Daniel C. Kredentser on August 8, 2011 and subsequent care and treatment provided at St. Peter's Hospital and St. Peter's Nursing and Rehabilitation Center. The federal action, however, names additional defendants, namely Trinity Health Corporation and St. Peter's Health Partners.

The St. Peter's Defendants argue that they will be prejudiced if they are compelled to defend the exact same causes of action in both State and Federal Court and as between the two actions it is the federal action which must survive as it is more encompassing. While recognizing the "first-in-time rule" typically applied, they argue that the chronology of the actions is not necessarily dispositive as the federal action is more comprehensive than the pending state action as it names additional defendants, duplicates the causes of action herein and asserts new causes of action which could afford complete relief between the parties.

In opposition, plaintiffs oppose the motion. Plaintiffs' counsel acknowledges that on December 19, 2017, 3 months prior to the Court mandated deadline to file a Note of Issue in the instant action, plaintiffs commenced an action in the United States District Court for the Northern District of New York naming as defendants the Defendants in this action and St. Peter's Defendants' affiliates, Trinity Health Corporation and St. Peter's Health Partners. She acknowledges that the defendants alleged that the federal complaint contained substantially similar parties, claims and substantially similar relief sought by the plaintiffs in this action but notes that on January 16, 2018 she filed a motion in the federal action seeking authorization to amend the federal complaint. She further acknowledges that a review of the proposed amended complaint reflects that the underlying facts in the federal action are substantially similar to the facts underlying the action herein, however, she asserts that the claims for relief include state law claims against the St. Peter's Defendants with respect to their alleged negligent certification of Dr. Kredentser, theories of negligence per se and for punitive damages arising solely from violations by the defendants of federal law; federal causes of action arising under 42 CFR §§482, 483 and 423, the Federal Patient Bill of Rights, the Federal HIPAA statute and 42 USC §1983. Additionally, she notes that the federal litigation seeks relief against additional defendants creating

diversity of citizenship in the federal action. She argues that the relief sought in the federal action is not duplicative of the relief sought in this state court action.

Plaintiffs' counsel further argues that the plaintiffs would suffer extreme prejudice if the Court were to dismiss this action as the statute of limitations to commence a malpractice claim against the defendants had expired. The first amended complaint in the federal action, however, seeks relief pursuant to, *inter alia*, its first cause of action for "negligence-medical malpractice" against defendants Dr. Kredentser, St. Peter's Rehabilitation and St. Peter's Hospital.

In reply, the St. Peters' Defendants note that via the amended complaint, plaintiffs attempted to delete some of their state common law causes of action for negligence and medical malpractice leaving their causes of action based on violation of federal laws. They argue, however, that the relief sought in the (then-proposed) amended federal court action still encompasses all the relief sought in the state court action. As the federal action is based upon the same underlying facts and will encompass the damages sought in the state court action, the moving defendants argue that they are entitled to a dismissal. They assert that plaintiffs continue to pursue two separate actions in two different courts against the same defendants based on the same facts and that such actions are an abuse of the judicial process. They assert that plaintiffs could have moved in state court for leave to serve an amended summons and complaint which would assert all of the additional causes of action asserted in the federal complaint and would add Trinity Health Corporation and St. Peter's Health Partners as defendants. They argue that plaintiffs' claims of prejudice are meritless as they are attempting to litigate their claims in two separate forums. They argue that as plaintiffs elected to commence the action in federal court asserting the identical claims against the defendants as those being asserted in this action this action should be dismissed on the grounds that there is another action pending between the same parties for the same causes

of action and the plaintiffs should be required to pursue their claims in federal court as they have chosen.

Via a sur-reply, plaintiffs' counsel notes that on January 10, 2018 the St. Peters Defendants filed an answer to the federal complaint though the Kredentser Defendants had not. On January 16, 2018 plaintiffs assert that they filed a motion seeking to amend the federal complaint and on February 9, 2018 the federal court entered an order authorizing the plaintiffs to file the proposed amended complaint. Plaintiffs thereafter filed a Notice of Dismissal without prejudice of the federal action. The Kredentser Defendants acknowledged the dismissal was effective to dismiss the federal action against them. The St. Peters' Defendants, however, refused to stipulate to dismissal of the federal action without prejudice. Plaintiffs' counsel affirmed that District Court Judge Sannes entered an order determining that the plaintiffs' Notice of Dismissal was not effective as against the St. Peters' Defendants, Trinity and St. Peters' Health Partners, and authorized the Plaintiffs to file a motion for entry of an order voluntarily dismissing the federal action without prejudice, and setting down a scheduling order in anticipation of said motion.

Plaintiffs' counsel goes on, however, to state that plaintiffs have instead determined to continue with their claims in federal court based on St. Peter's refusal to dismiss the federal action without prejudice and as they believe they have meritorious claims. Plaintiffs also seek, without adequate explanation, sanctions against the Kredentser defendants and their counsel under 22 NYCRR §131-1.1 for the "frivolous filing of the portion of the motion seeing an award of costs against the plaintiffs".

The Court issued a letter dated April 10, 2018 requesting the status of the federal action. In response, the Kredentser Defendants noted that as plaintiffs voluntarily dismissed the federal action against them, no federal action is pending and accordingly, their pending motion to dismiss

pursuant to CPLR §3211(a)(4) is moot. They assert that the portion of their motion seeking costs based on the plaintiffs' cancellation of out-of-state depositions however, remains pending. The St. Peters' Defendants acknowledge that plaintiffs were permitted to file an amended complaint in the federal court action. With respect to plaintiffs' request for leave to file a motion for voluntary discontinuance after such filing, such request was granted by the Court however plaintiffs failed to file any such motion and the deadline to do so expired. In lieu of answering the Amended Complaint, the St. Peters' Defendants assert that they made a FRCP §12(b)(6) motion to dismiss which is returnable on April 18, 2018 and remains an active motion. Accordingly, their motion pursuant to CPLR §3211(a)(4) before this Court remains pending.

Plaintiffs assert, via letter dated April 12, 2018, that in response to the St. Peters' Defendants pending motion to dismiss in federal court plaintiffs have cross-moved to again amend the complaint in the federal action (*see* Proposed Second Amended and Supplemental Complaint). She asserts that the parties are awaiting decisions on both motions in the federal court action. Plaintiffs assert that a review of the provided Proposed Second Amended Complaint and Civil RICO Statement disclose that the claims for relief in the federal action are not duplicative of the claims for relief sought in the action pending before this Court. Plaintiffs argue that regardless of what the federal action decides, the pending St. Peter's Motion to Dismiss is moot.

Discussion

CPLR §3211(a)(4) provides that “[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . there is another action pending between the same parties for the same cause of action in a court of any state of the United States; the court need not dismiss upon this ground but may make such order as justice requires”. “Pursuant to CPLR §3211(a)(4), a court has broad discretion in determining whether an action should be

dismissed on the ground that there is another action pending between the same parties for the same cause of action. A court may dismiss an action pursuant to CPLR §3211(a)(4) where there is a substantial identity of the parties and causes of action. It is not necessary that the precise legal theories presented in the first action also be presented in the second action; rather, it is sufficient if the two actions are sufficiently similar and that the relief sought is the same or substantially the same. The critical element is that both suits arise out of the same subject matter or series of alleged wrong.” (*Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622 [2nd Dept. 2009] [internal citations and quotations omitted]).

“New York courts generally follow the first-in-time rule, which instructs that the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere. However, it is also clear that determining the priority of pending actions by dates of filing is a general rule that should not be applied in a mechanical way, and that special circumstances may warrant deviation from this rule where the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage” (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1 [1st Dept. 2007] [internal citations and quotations omitted]). Factors to be considered in determining whether such special circumstances exist include: (i) whether the prior action was filed preemptively after plaintiff learned that the opposing part intended to commence a case; (ii) whether the competing actions were commenced reasonably close in time; (iii) whether New York has a significant nexus to the dispute; and (iv) whether one action is further along compared to the other or is more comprehensive than the other (*see generally, L-3 Comm. Corp., supra; AIG Fin. Prods. Corp. v Penncara Energy, LLC*, 83 AD3d 495 [1st Dept. 2011]).

Based upon the record and the pending motions before the federal district court, the Court will stay the pending proceeding until a decision has been rendered by the federal district court as to the St. Peters' Defendants' motion to dismiss and the plaintiffs' cross-motion to amend the federal complaint (*see generally, Rothschild v Braselmann*, 157 AD3d 1027 [3d Dept. 2018]). While this action is certainly first-in-time, the plaintiffs chose years into the pending action and at the close of discovery to commence a new action in federal court which, per the original complaint and amended complaint, raised similar claims to that of this action based upon the same underlying facts and circumstances. As stated above, special circumstances may warrant deviation from the first-in-time rule where the action sought to be restrained is vexatious, oppressive or instituted to obtain some unjust or inequitable advantage. Given the procedural posture of the federal district court action, it is impossible to speculate whether the federal action is duplicative at this juncture as the federal court may dismiss plaintiffs' causes of action which could moot the St. Peters' Defendants' instant motion or may choose to retain jurisdiction and permit plaintiffs to amend their complaint a second time to remove, *inter alia*, the claims of malpractice, possibly demonstrating that the federal action would not be more comprehensive than the instant action. It is also unclear whether plaintiffs would be able to avail themselves of any relief pursuant to CPLR §205(a) in the event this action were dismissed and the federal action were dismissed. Accordingly, as CPLR §3211(a)(4) provides that the Court need not dismiss upon such ground but may make such order as justice requires, and noting that the parties have charted such a course as plaintiffs commenced the federal court action and as the St. Peters' Defendants refused to permit plaintiffs to dismiss the action without prejudice, the Court stays the instant action pending the outcome of St. Peters' motion to dismiss and the plaintiffs' cross-motion to amend her complaint in federal court.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.

Accordingly, it is hereby

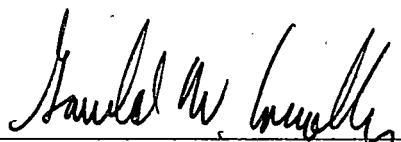
ORDERED that all pending motions before the Court, including the parties' respective motions for summary judgment are stayed and the Court will not consider any further submissions by the parties pending determination of the motions in the federal district court; and it is further

ORDERED that the parties notify the Court immediately upon receipt of a determination by the federal district court with respect to the pending motions at issue herein.

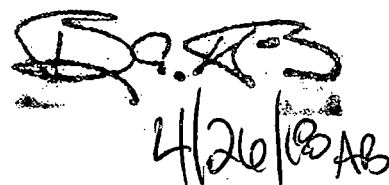
This shall constitute the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for the St. Peters' Defendants. The below referenced original papers are being retained by the Court for further proceedings and a copy of the Decision and Order is being transferred to the Albany County Clerk's Office. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

SO ORDERED.
ENTER.

Dated: April 20, 2018
Albany, New York



Gerald W. Connolly
Acting Supreme Court Justice



Papers Considered:

1. Notice of Motion dated January 11, 2018; affidavit of Marshall Broad, Esq., sworn to January 11, 2018 with exhibits A-O annexed thereto; and Memorandum of Law dated January 11, 2018;
2. Notice of Motion dated January 3, 2018; affidavit of Randall J. Ezick, Esq., sworn to January 3, 2018, with exhibits A-D annexed thereto; and Memorandum of Law dated January 3, 2018;
3. Affirmation of Denise L. Savage, Esq., dated January 16, 2018, with exhibits 1-2 annexed thereto;
4. Reply Affidavit of Randall J. Ezick, sworn to January 22, 2018
5. Responding Affidavit of Randall J. Ezick, sworn to January 22, 2018 in support of Motion for Leave to Amend and for Summary Judgment by Co-Defendants;
6. Reply Affidavit of Marshall Broad, Esq., sworn to January 26, 2018;
7. Affirmation of Denise L. Savage, Esq., dated February 14, 2018;
8. Letter Order of Court dated April 10, 2018;
9. Letter from Marshall Broad dated April 12, 2018, with attachment;
10. Letter from Denise L. Savage dated April 12, 2018, with exhibits 1-4; and
11. Letter from Amanda Kuryluk dated April 13, 2018 with attachment.