

**Darko v Guerrino**

2018 NY Slip Op 33507(U)

January 18, 2018

Supreme Court, Westchester County

Docket Number: 66554/2016

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER  
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ALBERTA DARKO,

Plaintiff,

INDEX NO. 66554/2016

-against-

DECISION/ORDER

GARY C. GUERRINO, M.D., GREGORY STANLEY, M.D., ERIN MURPHY, M.D., LAWRENCE MEDICAL ASSOCIATES, P.C. and NEW YORK-PRESBYTERIAN HOSPITAL-COLUMBIA MEDICAL CENTER,

Motion Seq. 3  
Submitted: 11/1/17

Defendants.  
-----X

ECKER, J.

The following papers numbered 1 through 17 were read on the motion of ALBERTA DARKO ("plaintiff"), made pursuant to CPLR § 602(a) and 602(b), for an order consolidating for trial this captioned action, with a prior action presently pending in this court, entitled ALBERTO DARKO v. RALPH J. D'ANGELO, M.D. and LAWRENCE HOSPITAL, Index No. 70565/2015:

PAPERS

NUMBERED

Notice of Motion, Affirmation, Exhibits A-I <sup>1</sup>	1 - 12
Affirmation in Opposition [Guerrino]	13
Affirmation in Opposition [all other defendants]	14
Reply Affirmation, Exhibits A-B	15 - 17

Upon the foregoing papers, the court determines as follows:

<sup>1</sup> Plaintiff's attorneys were previously advised in footnote 1 to this court's Decision/Order of June 26, 2017 that the court requires plaintiff to use numbered exhibit tabs, and not to repeat the same number (or in this case letter) within the same motion sequence.

In this medical malpractice/lack of informed consent action, plaintiff alleges she sustained physical injuries relating to a fall that apparently caused a piece of glass to become embedded in her leg. Specifically, on June 1, 2014, plaintiff cut her leg and went to the emergency room/department at defendant Lawrence Hospital<sup>2</sup> ("the Hospital"). She was evaluated by defendant Dr. Ralph J. D'Angelo and received stitches. Two days later, on June 3, 2014, plaintiff returned to the Hospital for further treatment [Reply Ex. A].

Thereafter, on June 9, 2014, plaintiff went to her primary care physician (defendant Dr. Gary C. Guerrino) at defendant Lawrence Medical Associates, P.C. located in Mount Vernon, New York ("the Physician's Office"). The doctor removed the sutures. Plaintiff thereafter returned to the Physician's Office two more times in June 2014. [Reply Ex. B]. Plaintiff alleges that, during this time, she was also treated by defendants Dr. Erin Murphy and Dr. Gregory Stanley and, in the complaint, asserts that these doctors served as agents of defendant New York Presbyterian/ Columbia University Medical Center [Pliff Notice of Motion Ex. A, Complaint ¶¶16, 25; Reply Affirmation p.3].

Several weeks later, on July 13, 2017, plaintiff again presented at the Hospital's emergency room complaining of leg pain. This time a piece of glass was discovered in plaintiff's leg and was removed. On August 1, 2017, plaintiff returned to the Physician's Office where the physician note reflects that a piece of glass had been removed from plaintiff's leg [Reply Ex. A & B].

On December 15, 2015, plaintiff commenced an action against the Hospital and Dr. D'Angelo based on the treatment that she received for the leg injury (Index No.70565/15) ("Action 1"). Discovery, including four examinations before trial, was completed. The action was marked ready for trial on August 17, 2017, and the Note of Issue/Jury Demand was filed on August 29, 2017.

Plaintiff commenced a second action on November 2, 2016, against the Physician's Office, New York Presbyterian/ Columbia University Medical Center<sup>3</sup>, Gary C. Guerrino, M.D., Gregory Stanley, M.D. and Erin Murphy, M.D. alleging that they also committed medical malpractice while treating plaintiff's leg injury (Index No. 66554/2016) ("Action 2"). This later action is under the supervision of the Compliance Part of the Court, with the next conference scheduled for January 30, 2018.

On October 11, 2017, plaintiff brought the present motion to consolidate Action 1 and

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<sup>2</sup> In support of the motion plaintiff submits medical records from defendant Lawrence Hospital and defendant Lawrence Medical Associates P.C. as Reply Exhibit A and B respectively.

<sup>3</sup>The court takes judicial notice of Lawrence Hospital being a subsidiary or affiliate of New York Presbyterian/Columbia University Medical Center, a fact well known to the general public in Westchester County.

Action 2. The application is opposed by the defendants named in Action 2. In the motion, plaintiff advises the court that the depositions taken in the Action 1 litigation have been exchanged with all parties in both actions; that most, if not all, of the medical records made available in the first action are the same needed for the second litigation, or if not, have already been exchanged (given the court's review of the notes in NYSCEF); and that depositions of additional parties or witnesses are ongoing.

A motion to consolidate pending actions is addressed to the sound discretion of the trial court, and consolidation is favored by the courts in serving the interests of justice and judicial economy. (See, CPLR § 602(a); *Lecorps v Bromberg*, 127 AD3d 931 (2d Dept 2015)). Where there is a common question of law or fact, and in the absence of a showing of prejudice to a substantial right to the party opposing the motion, the motion to consolidate should be granted (*Moses v B & E Lorge Family Trust*, 147 AD3d 1043 (2d Dept 2017); *Obuku v New York City Transit Authority*, 141 AD3d 708 (2d Dept 2016)). Further, consolidation is appropriate where it will avoid unnecessary duplication of trials, save unnecessary costs and expense, and prevent injustice which would result from divergent decisions based on the same facts (*Moses v B & E Lorge Family Trust*, *supra*). Here, the court finds that it is well within its discretion in granting plaintiff's motion.

At their very core, both actions spring from the alleged failure of all of the defendants to appreciate that a piece of glass remained embedded in plaintiff's leg for over a month, despite numerous hospital and doctor visits during which plaintiff complained of leg pain and other relevant symptoms. From the medical records submitted by plaintiff, and a reading of the two complaints, the alleged acts of medical malpractice were committed by physicians affiliated with the Physician's Office and the Hospital. The course of conduct that plaintiff alleges led to her injury, caused by the physicians and the hospitals she has now sues, occurred during the limited time frame of June 1, 2014 through August 1, 2014, and all relate to the leg injury.

Furthermore, defendants' argument that there will be undue delay caused by the granting of the motion because Action 1 is marked "trial ready" is unconvincing. Plaintiff has offered to withdraw the Note of Issue in the first action, which is authorized, to keep these two cases together from the date hereof. Of note, defendants fail to set forth any specific unreasonable delay that would result from the consolidation. As a practical matter, it takes approximately 9 months from the filing of the Note of Issue to the actual trial date, and there is often delay in medical malpractice actions, due to the difficulty in arranging for the parties' experts.

Moreover, defendants' claim that the consolidation will lead to jury confusion is speculative. The careful and assiduous efforts of the attorneys and the court in the presentation of the case, the charge to the jury and the verdict sheet will alleviate that possibility.

Under the circumstances the Court finds that it is well within its discretion in granting plaintiff's motion.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of ALBERTA DARKO, made pursuant to CPLR § 602(a), for consolidation of this action with the action entitled ALBERTO DARKO v RALPH J. D'ANGELO, M.D. v LAWRENCE HOSPITAL, Index No. 70565/2015, is granted, such that the caption of the matter shall be amended to read ALBERTO DARKO, Plaintiff against GARY C. GUERRINO, M.D., GREGORY STANLEY, M.D., ERIN MURPHY, M.D., LAWRENCE MEDICAL ASSOCIATES, P.C., NEW YORK-PRESBYTERIAN/COLUMBIA UNIVERSITY MEDICAL CENTER, RALPH J. D'ANGELO, M.D. and LAWRENCE HOSPITAL, Defendants, Index No. 70565/2015; and it is further

ORDERED that the Note of Issue/Statement of Readiness filed under Index No. 70565/2015 is hereby vacated; and it is further

ORDERED that the parties shall appear at the Compliance Part at 9:30 a.m. on January 30, 2018.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
January 18, 2018

ENTER

  
HON. LAWRENCE H. ECKER, J.S.C.

APPEARANCES

Tantleff & Kreinces, LLP  
Attorneys for Plaintiff  
Via NYSCEF

Benvenuto & Slattery  
Attorneys for Defendant Gary C. Guerrino, M.D.  
Via NYSCEF

Heidell Pittoni Murphy & Bach, LLP  
Attorneys for Gregory Stanley, M.D., Erin Murphy, M.D.,  
Lawrence Medical Associates, P.C. and New York-  
Presbyterian/Columbia University Medical Center, Defendants

Pilkington & Leggett, P.C.  
Attorneys for Ralph J. D'Angelo, M.D. and  
Lawrence Hospital, Defendants