Townson v New York City Health and Hosps. Corp.
2019 NY Slip Op 30417(U)
February 14, 2019
Supreme Court, New York County
Docket Number: 805111/2016
Judge: George J. Silver
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: GEORGE J. SILVER PART 10
Justice

JOHN TOWNSON,

Plaintiff,

- v -

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Defendant.

MOTION INDEX NO. 805111/2016

MOTION DATE
MOTION SEQ. NO. 001

Cross-Motion: ☐ **Yes** ■ **No**

Defendant NEW YORK CITY HEALTH AND HOSPITALS CORPORATION ("NYCHHC") moves, pursuant to CPLR § 602[a], to consolidate the above-captioned medical malpractice action for joint discovery and trial with a related medical malpractice action, *John Townson v. Dr. Gerald Wertlieb and Dr. Jeffrey Goldstein*, pending in Suffolk County Supreme Court (Index No. 616147/2017). NYCHHC also moves, pursuant to Unconsolidated Laws § 7401(3) and an Administrative Order, to transfer the consolidated action to me in New York County Supreme Court. NYCHHC further seeks an order directing all parties to appear before me on a date certain to enter into a joint discovery schedule.

Defendant DR. GERALD WERTLIEB ("Dr. Wertlieb") opposes the application. Neither plaintiff JOHN TOWNSON ("plaintiff"), nor co-defendant DR. JEFFREY GOLDSTEIN ("Dr. Goldstein"), opposes the application. For the reasons discussed below, the motion is granted.

BACKGROUND AND ARGUMENTS

On December 12, 2014, plaintiff was at work when he cut his right thumb with a utility knife, resulting in a deep laceration of the right thumb. Thereafter, plaintiff presented to Bellevue

Hospital ("Bellevue") for treatment for his injury. On March 11, 2016, plaintiff commenced a medical malpractice action ("Action #1) against NYCHHC in New York County. Plaintiff alleges that as a result of NYCHHC's negligence, he sustained multiple injuries, required surgery to repair his torn tendon, and has a permanent disability of the hand and thumb.

On August 4, 2017, plaintiff commenced a second medical malpractice action ("Action #2") in Suffolk County. Plaintiff alleges that from January 7, 2015 until approximately May 9, 2015, Drs. Wertlieb and Goldstein caused further damage to his thumb, leaving him permanently partially disabled. To date, a preliminary conference has not been held for either action, and a request for judicial intervention has not been filed in Action #2.

NYCHHC argues that the two actions should be consolidated since both arise out of the same facts and circumstances, and pertain to the same injuries. Specifically, NYCHHC asserts that a common issue exists as to the extent each defendant may be responsible for plaintiff's alleged injuries. In that regard, NYCHHC posits that because the defendants in both actions, by their separate and independent alleged acts of negligence, caused a single, inseparable injury to plaintiff, each defendant can be expected, and will be entitled to, make a case for apportionment of liability and damages.

NYCHHC also argues that consolidation will not prejudice plaintiff. NYCHHC maintains that there will be no delays in discovery since both actions are in the early stages of litigation. Lastly, NYCHHC submits that the actions must be consolidated in New York County pursuant to Unconsolidated Laws § 7401(3) since Action # 1 arose in New York County.

In opposition, Dr. Wertlieb argues that consolidation should be denied because although a common issue exists as to plaintiff's treatment for his right thumb injury, the cases involve separate and distinct allegations of medical malpractice at different stages of plaintiff's care. Dr. Wertlieb

contends that contrary to NYCHHC's assertion, the two actions involve separate allegations of malpractice by three separate medical providers, in two different jurisdictions, over the course of several months. According to Dr. Wertlieb, plaintiff received sutures for his thumb injury at Bellevue on December 12, 2014, and was subsequently treated by Drs. Goldstein and Wertlieb in January and March of 2015, respectively. Dr. Wertlieb further adds that Action #2 involves physical therapy treatment for plaintiff's thumb, which is unrelated to plaintiff's initial treatment at Bellevue.

In addition, Dr. Wertlieb argues that consolidation is premature since the case is in early discovery. Dr. Wertlieb highlights that plaintiff saw Dr. Goldstein twice, but without reviewing Dr. Goldstein's records, it is impossible to determine the surrounding circumstances of plaintiff's visits with Dr. Goldstein, the treatment rendered by Dr. Goldstein, and whether Dr. Goldstein treated plaintiff beyond his right thumb injury.

Finally, Dr. Wertlieb asserts that if the court were to grant consolidation, the actions must be consolidated in Suffolk County to avoid prejudice to Drs. Wertlieb and Goldstein. Dr. Wertlieb points out that both he and Dr. Goldstein maintain offices in Suffolk County, they only treated plaintiff in Suffolk County, and if the case were to go to trial, they should have the opportunity to have the matter heard by a jury of their peers in Suffolk County.

In reply, NYCHHC reiterates that consolidation is proper because common questions of law or fact exist as to the cause and extent of plaintiff's injuries. NYCHHC contends that although the two actions occurred at separate locations and at different times, plaintiff alleges that he sustained multiple injuries due to NYCHHC's negligence, and that Drs. Wertlieb and Goldstein's subsequent treatment caused further damage to his right thumb. In that regard, NYCHHC argues that based on plaintiff's allegation that Drs. Wertlieb and Goldstein exacerbated the injuries

allegedly caused by his initial accident and NYCHHC's treatment, consolidation is warranted to avoid the possibility of inconsistent verdicts. NYCHHC further argues that Dr. Wertlieb failed to demonstrate that consolidation would result in prejudice.

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 A.D.2d 145 [1st Dept. 1994] *quoting Amtora Trading Corp. v Broadway & 56th St. Assoc.*, 191 A.D.2d 212, 213 [1st Dept. 1993]; *see also Thayer v. Collett*, 41 A.D.2d 581, 581 [3d Dept. 1973] ["In granting a joint trial, it is not required that all questions of law or fact be common to the various actions."]). "The discretion of a court on a motion to consolidate should be accorded great deference" (*Amcan Holdings, Inc. v. Torys LLP*, 32 A.D.3d 337, 339 [1st Dept. 2006]).

The actions discussed herein present common questions of law and fact (*see* CPLR § 602). Indeed, as NYCHHC highlights, 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]). In *Melendez v. Presto Leasing*, the First Department held, "[a]lthough 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]; *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]). Likewise, here, although plaintiff

argues that the two actions involve separate allegations of medical malpractice by different providers during different stages of plaintiff's care, plaintiff's claimed injuries in both lawsuits involve his right thumb. Thus, plaintiff's allegations of similar, if not identical, injuries to the same body part in each lawsuit "is sufficient to warrant [consolidation] and joint trial" (*id.*).

Additionally, 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 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, "[o]ne 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 Action #2, plaintiff alleges that Drs. Wertlieb and Goldstein exacerbated the injuries allegedly caused by his initial accident and treatment at Bellevue. In that regard, because plaintiff's claimed injury in each lawsuit pertains to his right thumb, and because plaintiff alleges that Drs. Wertlieb and Goldstein caused further damage to his right thumb after his initial treatment at Bellevue, a joint trial is warranted to determine which injuries, if any, may have been caused by Bellevue/NYCHHC, and which

injuries, if any, may have been caused or exacerbated by Drs. Wertlieb and Goldstein (*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]; *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"]).

Furthermore, Dr. Wertlieb has not demonstrated that consolidation in New York County would complicate or prejudice his 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*). Rather, 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 (*Thayer*, 41 A.D.2d at 581, *supra).*

Moreover, the interest of judicial economy dictates that the two actions should be joined for discovery and trial. For instance, both actions are in the early stages of litigation as no preliminary conference or depositions have been held in either action (*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"]). Because NYCHHC has established that consolidation would promote judicial economy and consistent jury determinations, the two actions are hereby joined for discovery and trial in New York County (*see*, Unconsolidated Laws 7401(3)).

As such, it is hereby

ORDERED that NYCHHC's motion to consolidate the instant action with *John Townson v. Dr. Gerald Wertlieb and Dr. Jeffrey Goldstein* (Index No. 616147/2017) for joint discovery and trial is granted in full; and it is further

ORDERED that the two actions are consolidated for joint discovery and trial in New York County; and it is further

ORDERED that the two actions shall proceed under two separate captions; and it is further

ORDERED that the Clerk of the Suffolk County Court shall transfer the papers on file under Index No. 616147/2017 to the Clerk of the New York County Court upon service of a certified copy of this order and payment of the appropriate fee, if any; and it is further

ORDERED that the Clerk of the New York County Court, upon service of a copy of this order and payment of the appropriate fee, and the filing of an RJI, if necessary, if any, shall assign a new Index Number to the file presently captioned under Index No. 616147/2017, and place the two matters consolidated for joint discovery and trial by this court's directive before me, pursuant to an administrative order directing the same; and it is further

ORDERED that all the parties are directed to appear for a preliminary conference on April 9, 2019 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 facilitate discovery.

This constitutes the decision and order of the court.

Dated: February 14, 2019

George J. Silver

GEORGE J. SILVER

Check one: ☐ FINAL DISPOSITION ■ NON-FINAL DISPOSITION