

**Edwards v Menezes**

2020 NY Slip Op 30446(U)

February 3, 2020

Supreme Court, Kings County

Docket Number: 514709/19

Judge: Ellen M. Spodek

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 63 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3<sup>rd</sup> day of February, 2020.

PRESENT:

HON. ELLEN M. SPODEK,

Justice.

-----X

CECIL EDWARDS AND RUBY EDWARDS,

Plaintiff,

- against -

NELSON MENEZES, M.D.,

Defendant.

-----X

DECISION, ORDER AND JUDGMENT

Index No. 514709/19

KINGS COUNTY CLERK FILED 2020 FEB - 7 AM 11: 18

The following papers numbered 1-5 read herein:

- Motion/Order to Show Cause/Petition/Cross Motion and Affidavits (Affirmations) Annexed
- Opposing Affidavits (Affirmations)
- Reply Affidavits (Affirmations)
- Other Papers

Papers Numbered

1-2,	3-4
4	5
5	

Upon the foregoing papers, defendant Nelson Menezes, M.D. ("Dr. Menezes") moves, pursuant to CPLR 3211 (a) (4), for an order dismissing the complaint based upon the pendency of a prior action, *Edwards v Brooklyn Hospital Center and Nelson Menezes M.D.* (Sup Ct, Kings County, index No. 522212/18). Plaintiffs, Cecil Edwards and Ruby Edwards cross-move, pursuant to CPLR 602 (a), for an order alternatively denying defendant's motion and consolidating this action with the prior action.

### ***Background and Procedural History***

Plaintiffs Cecil Edwards and Ruby Edwards bring this action against Dr. Menezes for medical malpractice, lack of informed consent and loss of services arising from treatment culminating in surgery and amputation of Mr. Edwards' right leg by Dr. Menezes at Brooklyn Hospital Center ("BHC") on May 3, 2016.

Before commencing this action, plaintiffs commenced an action against Dr. Menezes and BHC, *Edwards, et ano. v The Brooklyn Hospital Center and Nelson Menezes M.D.* (Sup Ct., Kings County, index No. 522212/18) by filing a summons with notice on November 2, 2018, and subsequently serving a complaint (the 2018 Action). The allegations and causes of action in that case are substantially the same as those made in this case. Both complaints state treatment was rendered "beginning in or about 2012, and continuing through 2015, and April and May 2016, and more specifically on or about May 3, 2016 May 25, 2016 and thereafter" (the 2018 Action complaint and the 2019 Action complaint at 4-5, ¶¶ 16-17). However, this 2019 action only names Dr. Menezes as a defendant and refers to his treatment of plaintiff as "continuing until about January 5, 2017 and February 2, 2017" (the 2019 complaint at 4-5, ¶¶ 16-17). It also alleges that Dr. Menezes was the Chief of Vascular Surgery at BHC, and as such, directed BHC employees' actions regarding Mr. Edwards treatment (the 2019 action complaint at 3-4, ¶¶ 12 and 14).

It is uncontested that plaintiffs properly served BHC in the earlier case, but Dr. Menezes alleged that he was improperly served in that case because service was made at BHC rather than at his office or place of business. Nevertheless, Dr. Menezes appeared in that action by his attorneys and interposed an answer on April 18, 2019 and a motion to dismiss for lack of jurisdiction was filed on June 3, 2019, pursuant to CPLR 3211 (a) (8), based on improper service. Plaintiffs commenced this action on July 3, 2019, apparently to preserve their causes of action against Dr. Menezes should the earlier case be dismissed for lack of personal jurisdiction. Dr. Menezes, in turn, filed this motion to dismiss on August 16, 2019 based on the pendency of another action.

#### *Discussion*

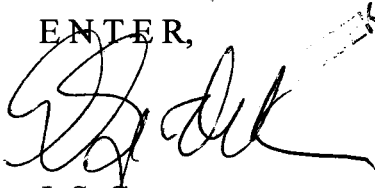
Courts have “broad discretion under CPLR 3211 (a) (4) to consider whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action” and where the relief sought is substantially the same in both actions (*Whitney v Whitney*, 57 NY2d 731, 732 [1982]; see also *JPMorgan Chase Bank, N.A. v Luxama*, 172 AD3d 1341, 1341 [2d Dept 2019]; *Scottsdale Ins. Co. v Indemnity Ins. Corp.*, 110 AD3d 783, 784 [2d Dept 2013]; *DAIJ, Inc. v Roth*, 85 AD3d 959, 959 [2d Dept 2011]). “The critical element is that both suits arise out of the same subject matter or series of alleged wrongs” (*Scottsdale Ins. Co.*, 110 AD3d at 784, quoting *Cherico, Cherico & Assoc. v Midollo*, 67 AD3d 622, 622 [2d Dept 2009] [internal quotation marks omitted]).

Here, plaintiffs' claims against Dr. Menezes in the two actions "both arise from the same subject matter and alleged wrongs, and involve substantial identity of the parties and similarity of claims" (*JPMorgan Chase Bank*, 172 AD3d at 1342). As the court has granted plaintiffs' cross motion to extend their time to serve Dr. Menezes in the 2018 Action, nunc pro tunc, all of the claims asserted in this 2019 Action may be fully litigated in the 2018 Action. Hence, exercising discretion to dismiss this 2019 Action based on the pendency of the 2018 Action against Dr. Menezes is warranted. Accordingly, it is

**ORDERED** that Dr. Menezes' motion for an order dismissing the complaint herein, pursuant to CPLR 3211 (a) (4), based on the pendency of the 2018 Action, *Edwards, et ano. v The Brooklyn Hospital Center and Nelson Menezes M.D.* (Sup Ct, Kings County, index No. 522212/18 ) is granted and the complaint herein is dismissed; and it is further

**ORDERED** that plaintiffs' cross motion for an order consolidating this 2019 Action with the 2018 Action, pursuant to CPLR 602 (a), is denied.

This constitutes the decision, order and judgment of the court.

ENTER,  
  
J. S. C.

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