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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 800047/2010
FROST, DEVORAH RIVKA
VS.
BAK, CHUNG SIN
SEQUENCE NUMBER : 001
SEVER ACTION

INDEX NO. 800047/10
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion by defendant Capital Region Orthopedic Group, P.C. to sever Causes of action 1 through 7 from causes of acton 8 through 10 is denied in accordance with the accompanying memorandum decision.

FILED

MAR 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: FEB 28 2011

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of DEVORAH RIVKA FROST, individually and as Administratrix of the Estate of DAVID FROST, deceased, PEREL FROST, an infant under the age of 14 by her mother and natural guardian DEVORAH RIVKA FROST, CHANNAH FROST, an infant under the age of 14 by her mother and natural guardian DEVORAH RIVKA FROST, ETTEL FROST, an infant under the age of 14 by her mother and natural guardian DEVORAH RIVKA FROST, and ESTHER FROST, an infant under the age of 14 by her mother and natural guardian DEVORAH RIVKA FROST,

Plaintiffs,

Index No. 800047/10
Motion Seq. No. 001 & 002

-against-

CHUNG SIN BAK, ALBANY MEDICAL CENTER a/k/a ALBANY MEDICAL CENTER HOSPITAL, ALBANY MEDICAL CENTER ANESTHESIA GROUP, P.C., DAVID BARNERT, M.D., CAPITAL REGION ORTHOPEDIC GROUP, P.C., KAUSHIK BAGCHI, M.D. and SHARON SAMUELS, M.D.,

Defendants.

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SCHLESINGER, J.

The instant action brought by plaintiff Devorah Rivka Frost on behalf of herself, her deceased husband David Frost, and their four children involves personal injury claims arising out of an automobile accident and medical malpractice claims arising out of treatment that Mr. Frost received at Albany Medical Center for injuries allegedly sustained during the accident. Prior to the commencement of this action (Action 2), Mr. Chung Sin Bak, the driver of the other vehicle in the accident, commenced his own action, *Chung Sin Bak v. David Frost*, index number 101686/10 (Action 1), for injuries

that he allegedly sustained as a result of the accident. Plaintiffs in the above-captioned action (2) have now moved pursuant to CPLR § 602 to consolidate Action 1 with Action 2 for a joint trial. All the defendants in Action 2 have opposed, arguing that consolidation would result in undue prejudice and jury confusion.

Additionally, defendant Capital Region Orthopedic Group, P.C. (Capital) has moved in this action (2) to sever the causes of action pertaining to the automobile accident (1 through 7) from the causes of action pertaining to the alleged medical malpractice (8 through 10). As venue was set in New York County based on Mr. Bak's residence here, Capital further seeks to change venue for the severed medical malpractice claims to Albany County where the treatment was provided, as there would no longer be a basis for venue here without Mr. Bak as a party, and a change in venue would convenience material witnesses.

Defendants Albany Medical Center, Albany Medical Hospital, Albany Medical Center Anesthesia Group, P.C., David Barnert, M.D., Kaushik Bagchi, M.D., and Sharon Samuels, M.D. (the AMC Defendants) support Capital's motion to sever and have cross-moved to change venue for all causes of action to Greene County where the automobile accident occurred or Albany County where the medical treatment at issue here was provided. Plaintiffs oppose both of these motions, arguing that venue in New York County is proper and that the causes of action should not be severed.

Background Facts

On December 13, 2009, plaintiffs' decedent David Frost was in an automobile accident with defendant Chung Sin Bak, which allegedly resulted in serious injuries to himself, his wife, and their four children. According to plaintiffs, Mr. Frost was driving on

Route 23 in Greene County when Mr. Bak struck their vehicle while changing lanes. (Aff. of Plaintiffs' Counsel in Support of Motion to Consolidate, ¶ 3). After the accident, Mr. Frost was taken to Columbia Memorial Hospital and that same day was transported to Albany Medical Center. (Aff. of AMC Defendants' Counsel in Support of Cross-Motion, ¶ 10). On the next day December 14, 2009, Mr. Frost underwent surgery for injuries he sustained in the accident to his right knee, leg and foot. Following complications from his surgery, allegedly related to his anesthesia and respiratory treatment, Mr. Frost died on December 21, 2009 at Albany Medical Center. (Frost Complaint, ¶¶ 122-123). Mr. Bak, the driver of the other vehicle, also allegedly suffered injuries as a result of the accident, which he contends was caused solely by Mr. Frost's negligence. (Bak Complaint, ¶¶ 14-18).

On February 8, 2010, Mr. Bak commenced an action against Mr. Frost for injuries he allegedly sustained as a result of the December 13 automobile accident. On August 19, 2010, the Frost family commenced the instant personal injury and medical malpractice action against Mr. Bak and various medical providers for injuries sustained by the members of the Frost family as a result of the same accident and for injuries that Mr. Frost sustained as a result of the medical treatment he received at Albany Medical Center for the same injuries.

The various motions discussed above were then filed and are now before this Court. They raise three separate issues: (1) whether this action, Action 2, for personal injuries suffered by the Frost family in the automobile accident and for medical malpractice should be consolidated for joint trial with Action 1 commenced by Mr. Bak for injuries he suffered in the accident; (2) whether the causes of action in this case

pertaining to the alleged medical malpractice should be severed from the causes of action pertaining to the automobile accident; and (3) whether venue in New York County is proper, or alternatively, whether defendants are entitled to a discretionary change of venue. These three issues will be addressed individually below.

1. Consolidation of the Two Automobile Accident Cases is Granted

Plaintiffs contend that Action 2 commenced by the Frost family and Action 1 commenced by Mr. Bak should be consolidated because they both arise out of the same motor vehicle accident that occurred on December 13, 2009 and thus contain common issues of law and fact. Mr. Bak opposes this motion, arguing that he would be unduly prejudiced by consolidation because Action 2 involves a broader set of medical malpractice claims that do not pertain to him and that will require lengthier discovery likely to delay the resolution of his action. Additionally, Mr. Bak argues that consolidation of the two actions would result in jury confusion since each party will be acting as both a plaintiff and a defendant and the complex nature of Mr. Frost's malpractice claims may overshadow his case. Capital also opposes the motion on the ground that it will further burden the litigation of the malpractice claims. The AMC Defendants oppose the motion to the extent that the consolidated action would be venued in New York County because they seek to change venue to Greene County, where the automobile accident occurred, or Albany County where the medical treatment was provided.

According to CPLR § 602, "When actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all the matters in issue, may order the actions consolidated, and may make such other

orders concerning proceedings therein as may tend to avoid unnecessary costs or delays." Here, the two actions in question clearly involve common questions of law and fact as they both arise from the same accident and involve the same parties. In fact, holding separate trials to determine liability and damages for the same car accident could result in conflicting and absurd results.

Therefore, plaintiffs' motion to consolidate the two actions for joint trial is granted. The fact that Mr. Bak's claims do not relate to any of the medical malpractice causes of action does not itself preclude consolidation. Any concerns regarding potential delays, onerous discovery, and overshadowing of claims can be addressed through the alternative means discussed below.

2. Severance of the Medical Malpractice Claims is Denied

According to defendant Capital, causes of action 1 through 7 relating to the automobile accident involve defendant Bak only and seek relief for injuries sustained by the Frost family as a result of Mr. Bak's negligence. In contrast, causes of action 8 through 10 involve only the various medical providers who treated Mr. Frost at Albany Medical Center and sound in medical malpractice based on the allegedly improper medical treatment that Mr. Frost received after the accident. It is Capital's position that these two sets of claims should be severed as there are no common questions of fact or law between them, individual issues predominate, and trying the two claims together would result in jury confusion. Additionally, Capital argues that it will be prejudiced by having to incur significant expense based on the discovery that will ensue if it is forced to participate in litigation involving the automobile accident. The AMC Defendants support the motion to sever, arguing similarly that the claims arising out the automobile accident are unrelated to the claims arising from the alleged malpractice.

Plaintiffs oppose the motion to sever, arguing that the claims are interrelated, are not too complex to be heard by the same jury, and that a single jury should determine which party is responsible for which specific injury as well as any exacerbation of that injury. Additionally, plaintiff contends that the current trend favors joint trials to reduce calendar congestion.

According to CPLR § 603, "In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue." Although severance under CPLR § 603 is a discretionary determination, the First Department has looked at several factors in determining whether that discretion is properly exercised, including interrelatedness of claims, prejudice to either party, and whether a joint trial will confuse the jury.

In actions involving "a common nucleus of facts," the First Department has concluded that "a trial court should only sever the action to prevent prejudice or substantial delay to one of the parties...." *Sichel v. Community Synagogue*, 256 A.D.2d 276 (1st Dep't 1998). Thus, in *Sichel*, where the plaintiff fell on the premises of a synagogue and sued a general contractor for work performed on the site, the Appellate Division reversed the trial court's decision to sever a third-party suit commenced a year later by the general contractor against a subcontractor court since the consolidation would not prejudice any party.

As the First Department indicated in *Kupferschmid v. Hennessy*, 221 A.D.2d 225, 226-27 (1st Dep't 1995), severance is particularly inappropriate "where the commonality involves two interrelated injuries and the issue of exacerbation" because "[o]ne jury hearing all of 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.* quoting *Thayer v. Collett*, 41 A.D.2d 581 (3d Dep't 1973)(severance of two personal injury actions was improper where plaintiff's injuries from second car accident could have exacerbated injuries from the first, albeit unrelated, car accident).

In the case at hand, defendant Capital's motion to sever must be denied. Causes of action 1 through 7 relating to the driver's negligence and causes of action 8 through 10 relating to medical malpractice all arise from a common nucleus of facts. What is more, the injuries are sufficiently interrelated, particularly given potential claims of the Medical Center's aggravation or exacerbation of injuries sustained by Mr. Frost in the automobile accident.

Although Capital correctly notes that its potential liability for medical malpractice may be determined independently from defendant Bak's liability for vehicular negligence, Capital fails to account for the fact that Mr. Bak's potential liability for any damages is interconnected with the damages claimed as a result of the medical malpractice. As the alleged initial tort-feasor, Mr. Bak can be held liable to plaintiffs not only for his negligent operation of his vehicle, but also for any foreseeable malpractice that exacerbated or aggravated Mr. Frost's injuries. *See Suria v. Shiffman*, 67 N.Y.2d 87, 98 (1986) ("the original wrongdoer is liable for all the proximate results of his own tortious acts, including aggravation of injuries by a successive tort-feasor...."); *Gomez v. New York City Hous. Auth.*, 161 A.D.2d 190 (1st Dep't 1990) (joint trial of an automobile accident and an unrelated slip-and-fall was appropriate where plaintiff alleged that her fall aggravated injuries she suffered in the automobile accident).

In *Dubicki v. Maresco*, 64 A.D.2d 645 (2d Dep't 1978), a case involving facts similar to the case at hand, plaintiff commenced a combined negligence and medical

malpractice action for injuries he sustained to his leg in an automobile accident and for the loss of use of his leg due to the negligent treatment of those injuries by the physician defendants. The court found that "the initial tort-feasors, are liable to the plaintiffs not only for the injuries caused by the negligent operation of their vehicle, but also for the reasonable foreseeable aggravation of Mr. Dubicki's conditions by subsequent acts of malpractice committed at Elmhurst General and by Dr. Dashefsky." *Id.* at 646.

In the instant action, not only does the Frost complaint allege (at ¶ 21) that Mr. Frost's wrongful death was caused by defendant Bak, but also the AMC Defendants have asserted a cross-claim against Mr. Bak arguing that "any injuries or damages suffered by plaintiffs' decedent and plaintiffs were sustained in whole or in part by reason of the negligence of co-defendant Chung Sin Bak and AMC defendants are entitled to indemnification and/or apportionment." (Aff. of AMC Counsel in Support of Cross-Motion at ¶ 5). Therefore, Mr. Bak's potential liability is at issue in both the motor vehicle and the medical malpractice cases.

Capital's assertion that the claims should be severed because individual issues predominate is unconvincing. The majority of cases cited by defendant in support of severance are distinguishable as they involve multiple plaintiffs with different medical histories challenging the use of a particular type of procedure or equipment in distinct medical procedures. *See Bender v. Underwood*, 93 A.D.2d 747 (1st Dep't 1983) (severance granted where six personal injury actions were brought by six distinct plaintiffs against the same defendant regarding flaws in their respective hair implantation procedures); *Reid v. Haher*, 88 A.D.2d 873 (1st Dep't 1982)(court reversed denial of severance where a claim was brought by two distinct plaintiffs who were

bringing claims against the same doctor for separate transactions); *DeAngelis v. New York Univ. Med. Ctr.*, 292 A.D.2d 237 (1st Dep't 2002) (court affirmed severance in a malpractice action brought by twin sisters who underwent same surgical procedure on successive days); *Gittino v. LCA Vision*, 301 A.D.2d 847 (3d Dep't 2003) (court affirmed severance where group of plaintiffs brought a medical malpractice action challenging the use of a particular piece of medical equipment in their respective surgeries by the same physician on the same date).

In the recent case of *Suckishvili v. Visiting Nurse Serv. of N.Y.*, 74 A.D.3d 433 (1st Dep't 2010), the First Department affirmed the trial court's denial of a motion to consolidate a negligence action based on a motor vehicle accident with a medical malpractice action relating to the subsequent treatment. Although neither court discussed the facts in detail, the case is nevertheless distinguishable based on the procedural posture. Specifically, the Appellate Division relied heavily on the fact that consolidation would cause prejudice because the negligence action was ready to be placed on the trial calendar, whereas the medical malpractice action was still at the discovery stage. In contrast, the two claims here have already been brought together as one case, which was only recently commenced, and no discovery has yet taken place. Therefore, keeping the two sets of claims together here would not cause prejudicial delays to any party.

Nonetheless, defendants argue that they will be unduly prejudiced by the burdensome discovery that is likely to result from litigating the claims together. CPLR § 603 affords the court both discretion and flexibility in fashioning an appropriate solution to address such issues. For example, in *Hasselback v. Verducci*, 134 A.D.2d 325 (2d Dep't 1987), plaintiff initiated one action to recover damages for personal injuries

allegedly sustained in an automobile accident and a separate medical malpractice action for injuries allegedly resulting from medical treatment received for those injuries. The court affirmed the Special Term's "innovative" determination directing "a separate liability trial of the automobile action in Kings County to be followed by a joint trial of the damages phase of the automobile action together with the entire medical malpractice action in the Supreme Court, Richmond County." *Id.* at 326.

A similar solution is appropriate here. It is therefore directed that a joint trial of Action 1 and Action 2 determining liability in the automobile accident take place first, followed by a joint trial of the damages phase of the automobile action, if liability is found, together with the full medical malpractice action. This frees Capital and the AMC Defendants from participating in discovery and trial on the issue of liability in the automobile accident, if they so choose, while ensuring consistent results. Further, this procedure allows the issue of damages to be fully addressed given potential questions of exacerbation, indemnification, and apportionment. This approach also ensures that Mr. Bak's action against Mr. Frost will not be overshadowed by the medical malpractice portion of the trial.

3. Venue in New York County is Proper

Since this Court has denied Capital's motion to sever, venue here remains proper under CPLR § 510(1) based on defendant Bak's residence in New York County. However, both Capital and the AMC Defendants have moved to change venue pursuant to CPLR § 510(3), arguing that the convenience of material witnesses and the ends of justice will be promoted by a change to Greene or Albany County.

Capital vaguely asserts that a change of venue to Albany County will be more convenient for the majority of the witnesses who are medical professionals who work in

Albany County. The AMC Defendants include somewhat more specificity, indicating that Officer Amedure, a New York State Police officer who operates out of Greene County and was responsible for investigating the motor vehicle accident, has noted that it would be easier for him to appear in Greene County where he works. The AMC Defendants also contend that material witnesses are likely to be called from Columbia Memorial Hospital, which treated Mr. Frost prior to his transfer to Albany Medical Center and is located in Columbia County, and from Northern Dutchess Paramedics Emergency Medical Services, who transferred Mr. Frost to Albany Medical Center and is located in Dutchess County. According to the AMC Defendants, it is likely that many of these anticipated witnesses live and work in or around Greene County and would therefore find it more convenient to testify there. Additionally, the AMC defendants assert that the convenience of defendant physicians and various material non-party witnesses such as fire department officials, paramedics, police officers, non-party treating physicians and other medical personnel would be served by changing venue to Greene County.

When moving for a discretionary change of venue based on witness inconvenience, the moving party bears the burden of making a detailed evidentiary showing that the convenience of material witnesses would be better served by the change in venue. *Hernandez v. Rodriguez*, 5 A.D.3d 269, 270 (1st Dep't 2004). This showing must include: (1) the identity of the proposed witnesses; (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced; (3) that the witnesses have been contacted and are available and willing to testify for the movant; and (4) the nature of the anticipated testimony and the manner in which it is material to the issues raised in the case. *Cardona v. Aggressive Heating*,

180 A.D.2d 572 (1st Dep't 1992). Only after such a detailed showing that material witnesses would in fact be inconvenienced will a change of venue be granted. *Hernandez*, 5 A.D.3d at 271.

In the instant case, defendants have failed to satisfy these factors. To meet their burden, defendants would have to provide an affidavit identifying specific *non-party* witnesses. However, the only non-party witness who is identified is Office Amedure, and while counsel's affidavit recounts a conversation that was held with Officer Amedure regarding his recollection of the accident, plaintiff correctly demonstrates that it lacks the requisite degree of specificity since it fails to make any clear assertions as to what the officer will actually testify to, how it is material, and whether the officer has expressly agreed to testify. Moreover, any assertions on behalf of defendant doctors regarding their own inconvenience are irrelevant because convenience to parties is not a factor in considering a discretionary motion to change venue. *Gissen v. Boy Scouts of Am.*, 26 A.D.3d 289, 291 (1st Dep't 2006). Defendants' argument regarding court congestion is similarly unconvincing.

Lastly, it is argued that the accident occurred in Greene County and that a transitory cause of action should be tried in the county in which it arose. Defendant's reliance on outdated case law for this proposition is misplaced. Both the governing statute and case law are clear that such considerations are only taken into account on a motion for a discretionary change of venue based on inconvenience to material witnesses. *O'Brien v. Vassar Bros. Hosp.*, 207 A.D.2d 169, 173-74 (2d. Dep't 1995). Since defendants' assertions fall short of meeting the detailed evidentiary showing required to grant a discretionary change of venue, both Capital's motion and the AMC Defendants' cross-motion to change venue are denied.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to consolidate Action 1 and Action 2 is granted to the extent that the above-captioned action shall be jointly tried with *Bak v. Frost*, Index No. 101686/10, pending in this court, in accordance with the sequence laid out in this decision; and it is further

ORDERED that, within 30 days from entry of this order, the plaintiff in *Bak v. Frost* shall file and pay the fee for a Request for Judicial Intervention, to which shall be attached a copy of this order, and the Clerk shall assign said action to the undersigned Justice; and it is further

ORDERED that, within 30 days from entry of this order, counsel for the movant shall serve a copy of this order with notice of entry upon the Clerk of the Trial Support Office (Room 119); and it is further

ORDERED that upon payment of the appropriate calendar fees and the filing of notes of issue and statements of readiness in each of the above actions, the Clerk of the Trial Support Office shall place the aforesaid actions upon the trial calendar for a joint trial; and it is further

ORDERED that defendant Capital's motion to sever causes of action 1 through 7 from causes of action 8 through 10 is denied; and it is further

ORDERED that the motion and cross-motion submitted by Capital and the AMC Defendants, respectively, to change venue to Albany County or Greene County are denied and plaintiffs' action shall proceed in New York County.

The parties are directed to appear before the Court in Room 222 on April 27, 2011 at 9:30 a.m. for a preliminary conference. Counsel shall respond to all outstanding

Demands for a Bill of Particulars and authorizations for records at least twenty days before that time.

This constitutes the decision and order of the Court.

Dated: February 28, 2011

FEB 2 0 2011

J.S.C.

ALICE SCHLESINGER

FILED

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