2012 WL 7220810 (N.Y.Sup.) (Trial Motion, Memorandum and Affidavit)
Supreme Court of New York.
Queens County

Hyung Ki LEE, as Administrator of the Estate of Nam Yoon Lee, Deceased, and Young Sook Lee, Individually, Plaintiffs,

v.

NEW YORK HOSPITAL QUEENS, James Maurer, M.D., Janice-Lam, M.D., Steven Mitchell Cohen, D.O., and Edward Bennett, M.D., Defendants.

No. 2402/09.
January 10, 2012.

Plaintiffs' Memorandum in Opposition to the Defendants' Effort to Prevent Plaintiffs from Proving the Defendant Doctors' Liability

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PRELIMINARY STATEMENT

After plaintiffs' decedent, Nam Yoon Lee, suffered terribly for days and then died as a result of the defendants' negligence, plaintiffs brought this action sounding in medical malpractice and wrongful death against New York Hospital Queens, Dr. James Maurer, M.D., Dr. Janice-Lam, Dr. Steven Mitchell Cohen, and Dr. Edward Bennett. Plaintiffs have alleged that each of those defendants were negligent and departed from the standards of good and accepted medical practices, and that each of their negligent acts and departures were substantial contributing factors to Mr. Lee's pain and suffering and wrongful death.

So indisputable was the malpractice that killed Mr. Lee that the defendant hospital has resolved to concede that it is liable for his pain and suffering and death. The defendant physicians, however, have apparently decided not to join in the concession of liability. Accordingly, the plaintiffs intend to prove their malpractice at trial. The defendants are nevertheless attempting to prevent plaintiffs from doing so. That effort is improper and should be denied.

THE PURPORTED LIABILITY CONCESSION

The issue of a potential concession of liability was first raised by defense counsel in a letter sent to plaintiffs on August 17, 2010, in which counsel stated that the defendant hospital was "considering conceding liability in this action," and that it would consider amending its Answer to reflect a concession unless it could be done by stipulation (*See* August 17, 2010 letter from Shawn P. Kelly, Exhibit F to defendants' Order to Show Cause). It was next raised at a conference on April 11, 2011, when defense counsel, Mr. Kelly, stated that they were "prepared to concede liability" -- no representation was made that they would be conceding liability as to some defendants but not others (see Affirmation of Robert L. Futterman, dated November 8, 2011, submitted herewith). The issue was then raised at a settlement conference on June 28, 2011, at which time defense counsel, Eric B. Betron, indicated that they would be conceding liability and that the trial would be on damages only -- again, no representation was made that they would be conceding liability as to some defendants but not others (see Affirmation of Carmine A. Rubino, dated November 8, 2011, submitted herewith). Remarkably, while indicating they would concede liability, the defendants inexplicably refused to make any offer of settlement (*see* Rubino Aff.).

On November 4, 2011, after the case was assigned for trial and a conference was held before this Court, defense counsel informed plaintiffs that the concession of liability they had decided upon would extend only to the hospital, and that it would exclude each of the individually named defendant doctors. Plaintiffs made clear at that time that they have claims against the individual defendant doctors, and that they intend to pursue those claims. The defendants argued that the plaintiffs should be prevented from proving such claims because the hospital was accepting responsibility for the decedent's injuries and death, or alternatively that the claims against the defendant doctors should be severed and that a trial on damages only should proceed against the hospital.

This Court instructed the parties to brief the issue in legal memoranda, with the defendants to exchange theirs by 4:00 p.m. on November 7, 2011, the plaintiffs exchanging theirs by 4:00 p.m. on November 8, 2011, and the parties appearing before the Court to resolve the issue on the morning of November 9, 2011. On the afternoon of November 4, 2011, defense counsel sent a letter indicating that they would be appearing in the *ex parte* motion office at 2:00 p.m. on November 7, 2011, with an Order to Show Cause addressing the very matters that this Court had ordered briefed. Counsel for both sides appeared at the *ex parte* motion office at that time and were referred to this Court, at which time the Court indicated that the parties should proceed in accordance with the Court's original instructions on this issue.

Plaintiffs have now been served with the Order to Show Cause, but no memorandum of law from the defendants. The defendants' Order to Show Cause indicates that the defendant hospital is seeking to amend its answer to concede liability by the hospital, and is moving to sever the claims against the defendant doctors and for a trial on damages against only the hospital.

The defendants' Order to Show Cause makes several inaccurate factual representations, which are addressed in the Futterman and Rubino Affirmations, submitted herewith. More interesting, however, is the fact that the defendant hospital's Proposed Amended Verified Answer indicates that it seeks to admit to causally related negligence and malpractice by the hospital and "its agents, servants and employees other than" the individually named defendant doctors (*see* defendants' Proposed Amended Verified Answer, ¶¶ 8, 9, 10, 12). The hospital's position is astounding -- all of its agents, servants and employees were negligent and caused the decedent's injuries and death, except the ones that the plaintiffs sued directly. The argument is an obvious sham.

This is a transparent ploy by the defendants to try to prevent the plaintiffs from proving their case against the defendant doctors, and it has no basis in the law whatsoever. The plaintiffs have asserted claims against these doctors from the very inception of the action. They were never dismissed on summary judgment - the defendants never even moved for summary judgment (and the time for such a motion is long gone). There is simply no legally cognizable or permissible basis for forcing the plaintiffs to discontinue those meritorious claims, or for preventing the plaintiffs from proving them.

The defendants have indicated that they are entitled to this extraordinary relief because the hospital has stipulated to accept one-hundred percent of the responsibility. This is factually and legally inaccurate. As a legal matter, the law is clear that the defendant hospital's responsibility does not serve to divest the plaintiffs of their right to prove their claims against the individual defendant doctors. As a factual matter, the defendant hospital has not accepted one-hundred percent of the responsibility for the injuries and death - the Proposed Amended Verified Answer specifically states as a "first, separate and complete defense" that "the answering defendant, if found liable at all, is entitled to a limitation of that liability pursuant to Article 16 of the CPLR" (*see* defendants' Proposed Amended Verified Answer, First Defense, ¶ 14). This speaks volumes.

The statement about "the answering defendant, if found liable at all" raises a glaring question as to whether the defendant hospital is truly conceding liability, or whether it has some other scheme intended to establish that it owes the plaintiffs nothing. A party cannot purport to concede liability, thereby admitting both negligence and causation of all of the injuries and death, and at the same time assert that it may not be liable at all. Yet, this is precisely what the hospital has done in its Proposed Amended Verified Answer. It has been mystifying that the defendant professes to be willing to concede liability but has refused to make any settlement offer. The statement "if found liable at all" raises further suspicions of chicanery.

Equally telling is the mere fact that the defendant continues to assert Article 16 as a defense. If the hospital is willing to take one-hundred percent of the responsibility for the decedent's injuries and death, Article 16 has no place in its Answer or in the trial. This highlights the importance of the plaintiffs' right to prove their case in the manner in which they have brought it. If the hospital has any inkling of blaming anyone else in the world for the purposes of Article 16, the plaintiffs would have to set forth chapter and verse the negligence and malpractice of the hospital and each of the defendant doctors to prevent a reduction of the defendants' share of liability.

Separate from the issues raised by the Article 16 defense, there are other important reasons why the defendants' effort to prevent the plaintiffs from proving their claims against the defendant doctors would be improper and prejudicial. First, plaintiffs have a right to recover from those individual defendants, and usurping that right could impair their ability to obtain full recovery for their damages by limiting that recovery to the hospital's insurance and assets. It should be noted in this regard that the insurance information provided by the defendants concerning the hospital's insurance coverage is less than clear, and is in fact contradictory. It may well be that the plaintiffs will need to recover from the defendant doctors to receive full compensation. To date, nearly three years after this lawsuit was instituted, plaintiffs have yet to obtain accurate, written information on the existing insurance policies, amounts of coverage and carriers, despite many requests for this information.

Second, the decedent's family members, who watched their loved one suffer and die needlessly and prematurely as a result of the defendants' malpractice, have a right to see that those responsible for his injuries and death are held accountable in a court of law. The defendant doctors were among those so responsible. The plaintiffs have a right to seek justice against them, and there is no precedent for preventing this.

Third, the defendants' efforts to have the hospital concede liability and to remove the defendant doctors from the lawsuit is likely for the intended purpose of avoiding the obligation of the insurers and the hospital to report the defendant doctors to the National Practitioner Data Bank (45 C.F.R. § 60.7), which was "established for the purpose of tracking the activities of incompetent physicians." *Mileikowsky v. West Hills Hosp. and Medical Center,* 203 P.3d 1113, 1118 (Cal. 2009). This would be a blatant violation of public policy, and should not be permitted.

Finally, the defendants are clearly attempting to manipulate the litigation and pursue a particular trial strategy by conceding liability as to one defendant and removing the doctors involved in the negligent care from the lawsuit. The defendant hospital is certainly free to concede its negligence and malpractice, and its causal relation to the decedent's injuries and death. Indeed, all of the defendants are free to do so, and if they did the Court would not be addressing the instant dispute. However, the defendants cannot pursue whatever tactical advantage they perceive they would gain by conceding liability as to one defendant, and prevent the plaintiffs from proving their case in the manner in which they have proceeded from the inception of the litigation. The plaintiffs have claims against the defendant doctors, and they have a right to prove them in this trial.

The request to sever the claims against the defendant doctors from the claims against the hospital on what is literally the eve of trial is simply another transparent effort to deprive the plaintiffs of their right to pursue those claims. Severance would be patently inappropriate in this case. The claims against the hospital and the doctors are all inter-related and arise from the same care, and they all resulted in the same injuries. All of these claims have been prosecuted together and they should be tried together. This severance motion is nothing more than a feigned effort by the defense to accomplish that which clearly cannot be done -• forcing the plaintiffs to discontinue their claims against the defendant doctors and proceed only against the hospital.

POINT I

THERE WAS NO ORDER BY JUSTICE O'DONOGHUE REGARDING A CONCESSION OF LIABILITY BY THE DEFENDANT HOSPITAL AND A TRIAL LIMITED TO THE ISSUE OF DAMAGES AGAINST ONLY THAT DEFENDANT

The defendants' papers are filled with factual inaccuracies regarding what transpired before Justice O'Donoghue, and they are addressed in the Affirmations of Mr. Rubino and Mr. Futterman. In any event, the defendants cannot obtain a trial as to damages against only the defendant hospital based upon what they claim was an oral directive that was never recorded on the record and never reduced to writing. *See Jagiello v Moran,* 40 A.D.2d 757 (4th Dept. 1972) ("the alleged oral order made from the bench by the Justice Presiding at that hearing was not reduced to writing and entered. Such a direction has no validity..."). Nor was there any stipulation to that effect. *See Diarassouba v. Urban,* 71 A.D.3d 51, 57 (2nd Dept. 2009) (purported settlement agreement not binding where it "was never reduced to writing or entered onto the stenographic record"). Therefore, to the extent that the defendants are attempting to obtain a damages trial against only the defendant hospital based upon what they inaccurately claim was an oral directive from Justice O'Donoghue, they are not entitled to such relief on that basis.

POINT II

THE DEFENDANTS CANNOT PREVENT PLAINTIFFS FROM PURSUING THEIR CLAIMS AGAINST THE INDIVIDUAL DEFENDANTS BASED ON THE LIABILITY OF THE DEFENDANT HOSPITAL

There is no precedent for the proposition that a plaintiff in a lawsuit may be compelled to discontinue claims against individual defendants merely because another defendant will be held liable. The suggestion is preposterous.

It becomes no less so by arguing (as the defendants have done here) that the defendant that will be held liable has sufficient assets or insurance coverage for any potential verdict (which itself remains a major question in this case relative to the defendant hospital). This is clear from the fact that individual defendants may be held accountable for injuries caused by their negligence while acting on behalf of the State of New York, even though the State itself may be held vicariously liable for their negligence. *See Morell v. Balasubramania,* 70 N. Y.2d 297, 302-03 (1987); *Murtha v. New York Homeopathic Med. Coll. and Flower Hosp.,* 228 N.Y. 183, 185 (1920); *LAL Leasing Corp. v. Williams,* 150 A.D.2d 643 (2nd Dept. 1989); *Matter of Garcia v. Reid,* 134 A.D.2d 351 (2nd Dept. 1987). As the Second Department held in *Matter of Garcia,* 134 A.D.2d at 351-52:

> Since this suit against the individual respondents sounds in tort for damages arising out of an alleged breach of a duty owed individually by those respondents directly to the petitioner, the State is not the real party in interest even though it could be held secondarily liable for the tortious acts under the doctrine of respondeat superior. Thus, this matter can be maintained against the respondents in the Supreme Court, Dutchess County (*see, Morell v Balasubramanian,* 70 NY2d 297).

Nor can individual defendants in a medical malpractice action obtain dismissal merely because the hospital will be liable. In *Colombini v. Westchester County Healthcare Corp.,* 24 A.D.3d 712, 714 (2nd Dept. 2005), an action involving claims of negligence, medical malpractice and wrongful death, the Second Department reversed an order that granted summary judgment to three individual defendants on the ground that their respective employers, including the defendant hospital (which conceded liability in its answer), were the only proper defendants:

> Contrary to the conclusion of the Supreme Court, the defendant Mary Nadler and the defendant MRI technicians, Patricia Lauria and Paul Daniels, were not entitled to summary judgment on the ground that only their employers are the proper defendants. While an employer may be vicariously liable for the torts of its employee while acting within the scope of his or her employment (*see Riviello v Waldron,* 47 NY2d 297, 302; *Manno v Mione,* 249 AD2d 372), a claim against the employer does not necessarily preclude a separate claim against the employee (*see Morell v Balasubramanian,* 70 NY2d 297, 302-303; *LAL Leasing Corp. v Williams,* 150 AD2d 643).

Thus, where, as here, a hospital concedes that it is liable for injuries and death, the individual defendants also named in the suit are not absolved of liability, and plaintiffs cannot be compelled, through any mechanism, to discontinue or otherwise forego their claims against those defendants.

Notably, the same situation at issue here was presented in *Desiderio v. Ochs,* 100 N.Y.2d 159 (2003) - the defendant hospital conceded liability but the defendant doctor did not. As the Court noted, "[t]he hospital's liability was not an issue at trial."]d. at 165. As a result, the plaintiff proved the doctor's malpractice at trial. Just as in the present case, the defendants in *Desiderio* were represented by the same counsel.

There is thus no question that the plaintiffs herein may pursue their claims against the individual defendant doctors, and that the defendants cannot compel otherwise. As will now be demonstrated, the defendants cannot accomplish that which is not permitted under the guise of severing the claims against the defendant doctors.

POINT III

SEVERANCE OF THE CLAIMS AGAINST THE DEFENDANT DOCTORS WOULD BE HIGHLY INAPPROPRIATE AND SHOULD BE DENIED

This case involves claims of medical malpractice and negligence against all of the defendants stemming from the time Mr. Lee entered the hospital on June 18, 2008 until he died there on June 22, 2008. Each of the defendants were all treating him for the same medical condition, and their malpractice resulted in the same injuries and in his death. Under these circumstances, it would be highly improper to sever the claims against the individual defendant doctors from those against the hospital.

The law is clear that severance is inappropriate where there are common issues involved in the claims, and the interests of judicial economy and consistency are served by having a single trial. *See New York Cent. Mut. Ins. Co. v. McGee,* 87 A.D.3d 622, 624 (2nd Dept. 2011); *Bentoria Holdings. Inc. V. Travelers Indemnity Corp.,* 84 A.D.3d 1135, 1137 (2nd Dept. 2011); *Zawadzki v. 903 E. 51st Street. LLC,* 80 A.D.3d 606, 608 (2nd Dept. 2011); *Quiroz v. Beitia,* 68 A.D.3d 957 (2nd Dept. 2009); *Ingoglia v. Leshaj,* 1 A.D.3d 482 (2nd Dept. 2003).

The Second Department's recent decision in *New York Cent. Mut. Ins. Co.,* 87 A.D.3d at 624, is instructive. The plaintiff commenced an action against a physician and 12 professional medical service corporations owned and operated by him alleging that they PCs were fraudulently incorporated in his name when they were actually owned and operated by unlicensed persons in violation of the law. The Supreme Court severed the action as to the 12 PCs, but permitted the plaintiff to serve an amended complaint against the doctor and three PCs on a theory of fraudulent incorporation. The Second Department held that severance was improper, stating as follows:

"Although it is within a trial court's discretion to grant a severance, this discretion should be exercised sparingly" (*Shanley v. Callanan Indus.,* 54 NY2d 52, 57; *see Curreri v Heritage Prop. Inv. Trust, Inc.,* 48 AD3d 505, 507; *Lelekakis v Kamamis,* 41 AD3d 662, 666). Severance is inappropriate where the claims against the defendants involve common factual and legal issues, and the interests of judicial economy and consistency of verdicts will be served by having a single trial (*see Bentoria Holdings, Inc. v Travelers Indent. Co.,* 84 AD3d 1135; *Curreri v Heritage Prop. Inv. Trust, Inc.,* 48 AD3d at 507-508; *Lelekakis v Kamamis,* 41 A.D.3d at 666; *Naylor v Knoll Farms of Suffolk County, Inc.,* 31 AD3d 726, 727). Here, the complaint alleged the existence of a common scheme to fraudulently incorporate the PCs through the use of Dr. McGee's professional license, which, if established, would render all of the PCs ineligible to recover no-fault benefits (*see State Farm Mut. Auto. Ins. Co. v. Mallela,* 4 NY3d 313, 319-322). The common factual and legal issues presented as to whether the 12 PCs were fraudulently incorporated predominate the action and, thus, the interests of judicial economy and consistency of verdicts would be not be served by requiring the plaintiff to commence multiple actions. To the contrary, such fragmentation would increase litigation and place "an unnecessary burden on court facilities" (*Shanley v Callanan Indus.,* 54 NY2d at 57), by requiring four separate trials instead of one.

Id.

These standards militate strongly against severing claims against different defendants arising from the same treatment and same set of operative facts in medical malpractice actions. The Second Department's decision in *Quiroz,* 68 A.D.3d at 960-61, is instructive. That medical malpractice action against the defendant hospital (Wyckoff Heights Medical Center) and the defendant radiology group (Wyckoff Imaging Services), stemmed from an alleged failure to diagnose and treat a pelvic tumor and breast cancer after mammography and radiologic films were taken at the hospital. The Court noted, in addressing an issue involving the relation-back doctrine as to the radiology group, that "the relevant claims clearly arose out of the same conduct, transaction, or occurrence." *Id.* at 959. With regard to severance, the Court found:

The Supreme Court properly exercised its discretion in denying Wyckoff Imaging's motion to sever the action insofar asserted against it and the estate's motion to sever the third-party action from the main action. "The determination to grant or deny a request for a severance pursuant to CPLR 603 is a matter of judicial discretion which should not be disturbed on appeal absent a showing of prejudice to a substantial right of the party seeking the severance" (*Naylor v Knoll Farms of Suffolk County, Inc.,* 31 AD3d 726, 727 [2006]). In this case, there are common factual and legal issues involved and the interests of judicial economy and consistency will be served by having a single trial (*see Curreri v Heritage Prop. Inv. Trust, Inc.,* 48 AD3d 505, 507 [2008]; *Ingoglia v Leshaj,* 1 AD3d 482, 485 [2003]), and Wyckoff Imaging and the Estate both failed to establish that a single trial would result in prejudice to a substantial right (*see Mothersil v Town Sports Intl.,* 24 AD3d 424, 425 [2005]).

Id. at 960-61.

The instant case indisputably involves common factual and legal issues as to each of the defendants. The claims against each of the defendants all arise from the same set of operative facts, and they all resulted in the same injuries. The interests of judicial economy and consistency mandate a single trial.

Moreover, all of these claims against each of the defendants have been pending against each defendant since the lawsuit was first brought. Therefore, any representation by the defendants that they would be subject to any prejudice at all by a single trial against all defendants has zero merit.

The existence of a concession of liability does not alter the analysis at all. The Second Department's holding in *Zawadzki,* 80 A.D.3d at 608, is instructive. That case involved claims under Labor Law §§ 200, 240, 241(6), and 241-a, against defendants Altilio and 903 LLC, the latter of which commenced a third-party claim against Ferro Fabricators. The plaintiffs subsequently commenced an action directly against Ferro. Defendant Altilio defaulted, and entered into a a stipulation to vacate the default but to concede liability to the plaintiff for the claims under § 240. Ferro did not sign the stipulation. The plaintiffs were thereafter awarded summary judgment on liability against defendant 903 LLC, and the case was set down for a trial on damages only against those defendants. Plaintiffs direct claims against Ferro were dismissed. However, Altilio subsequently commenced a fourth-party action against Ferro for contractual indemnification, and moved for a joint trial on the issue of damages and contractual indemnification. Ferro cross-moved to dismiss the fourth-party claim or to sever it from the main action. The Supreme Court granted the motion for a joint trial and denied Ferro's cross-motion, and Ferro appealed. The Second Department affirmed.

In addressing Ferro's motion to dismiss, the Court observed that it was Ferro's contention the fourth-party complaint should have been dismissed because it was prejudiced by the stipulation in which defendant Altilio consented to liability, and it did not consent to the stipulation. The Court rejected this argument, noting that the stipulation did not preclude Ferro from asserting a defense to Altilio's claim of contractual indemnification. The Court further noted that "[a]s Altilio conceded liability with respect to the plaintiffs only pursuant to Labor Law § 240, Ferro may still establish that Altilio was actively negligent and, therefore, is not entitled to contractual indemnification." *Id.* at 608. Next, with regard to severance, the Court held:

> [T]he Supreme Court providently exercised its discretion in denying that branch of Ferro's cross motion which was to sever the fourth-party action from the main action, and in granting that branch of Altilio's motion which was, in effect, to join for trial the issue of damages in the main action and the issue of contractual indemnification in the fourth-party action (*see* CPLR 603). Ferro failed to establish that a single trial would result in prejudice to a substantial right (*see Quiroz v. Beitia,* 68 AD3d 957, 960-961; *McCrimmon v. County of Nassau,* 302 AD2d 372).

Id.

The instant case similarly poses even no risk of prejudice to the defendants from a single trial. The hospital's concession in no way precludes the defendant doctors from asserting defenses to the plaintiffs claims that they departed from the standards of proper practice, or that those departures substantially contributed to the decedent's injuries and death.

The plaintiffs, on the other hand, would be severely prejudiced by having a damages trial against the hospital, and then having to have another trial against the other defendants. Moreover, separate trials could result in inconsistent verdicts on damages, which would likewise render separate trials for these defendants inappropriate. *See Johnson v. Gonzalez,* 67 A.D.2d 842 (1st Dept. 1979) (where amount awarded in damages against two separate defendants should be the same, "[a] severance of the action against [defendant] Rosa would possibly produce a contrary result and should not therefore have been granted"); *Kilpatrick v. Maya,* 14 A.D.2d (1st Dept. 1961) (same).

CONCLUSION

THE DEFENDANTS' EFFORT TO PREVENT PLAINTIFFS FROM PROVING THEIR CLAIMS AGAINST THE DEFENDANT DOCTORS OR TO SUBVERT PLAINTIFFS' RIGHT TO PURSUE THOSE CLAIMS BY SEEKING SEVERANCE OF THOSE CLAIMS SHOULD BE DENIED IN ITS ENTIRETY

Respectfully submitted,

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