

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: PART 32

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KAZI ISLAM, et al.,

Plaintiffs,

-- against --

**DECISION and ORDER**

Index No. 23591/2008

ELAINE BROWN,

Mot. Seq. No.: 1

Defendant

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The following papers numbered were read on this motion:	<u>Papers Numbered</u>
Notice of Motion.....	1
Affirmations in Opposition.....	2
Affirmations in Reply.....	3

**CHARLES J. MARKEY, J.:**

As an initial matter, the main motion by Mendolia & Stenz, as attorneys for Elaine Brown, was withdrawn on the return date of September 3, 2009.

Despite the withdrawal of the main motion, the Court will entertain the cross motion. The cross motion by the Office of Eric H. Green, Esq., representing Kazi Islam and Shamim-Peroin Islam, seeks to consolidate this action with an action commenced a year earlier in Supreme Court, Kings County, or to have a joint trial. The cross motion is opposed vigorously by Sean H. Rooney, Esq., representing Elaine Brown in the Kings County action.

The burden in opposing consolidation is on the opponent of consolidation or joint trial, here Mr. Rooney, as counsel for Brown. *Amcan Holdings, Inc. v. Torys, LLP*, 32 Ad3d 337 [1<sup>st</sup> Dept. 2006]; *Fashion Tanning Co., Inc. v. D'Errico & Farhart Agency*, 105 AD2d 1034 [3<sup>rd</sup> Dept. 1984]. Mr. Rooney argues that his case is already on the trial calendar in Kings County and will appear on that calendar, for the first time, in Jury Coordination Part 1 ("JCP1"), tomorrow, on September 15, 2009. The undersigned has been advised that examinations before trial ["EBTs"] already scheduled in the above-captioned Queens County case will also occur shortly, in mid-September.

Although Mr. Rooney does not cite any cases in his opposing papers, this Court's independent legal research has confirmed that Mr. Rooney is correct that courts have denied motions to consolidate where the two actions are at different procedural stages. *See, e.g., Abrams v. Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 [1<sup>st</sup> Dept. 2003]; *F & K Supply, Inc. v. Fowler & Keith Supply Co.*, 197 AD2d 814, 814-815 [3<sup>rd</sup> Dept. 1993]; *Steuerman v. Broughton*, 123 AD2d 68 [2<sup>nd</sup> Dept. 1986]; *Rennert Diana & Co., Inc. v. KIN Chevrolet, Inc.*,

137 AD2d 589 [2<sup>nd</sup> Dept. 1988].

Notwithstanding the aforementioned cases, this Court does not believe that, under the facts of this case, the tardiness of the discovery in the Queens County action is reason alone to deny consolidation. Both actions, in Kings County and Queens County, arise from the same motor vehicle accident. They involve the same parties, except that the Queens County action adds the wife of Kazi Islam, Ms. Shamin-Peroïn Islam, regarding her loss of consortium claim.

By transferring the Queens action to Supreme Court, Kings County, the justices of that court will have better management control of both actions and will take all steps necessary to move and expedite discovery in the above-captioned action case so that it quickly catches up to a trial footing.

Mr. Rooney's argument is also misplaced. This is a simple, garden variety motor vehicle accident. The parties have been deposed in the Kings County action, so that the lawyers know what to expect when the discovery and EBTs of the above-captioned action take place. There is no identifiable reason why the discovery of the above-captioned action should dawdle once the file is transferred from the Clerk of Queens County to the Clerk of Kings County.

The risk of denying consolidation is that two different juries or fact-finders may have two inconsistent results. *Davidov v. Searles*, 2008 WL 2513476, 2008 NY Slip Op 51253 [U] [Sup Ct Kings County 2008]. Courts abhor the specter of inconsistent results. *Jett v. Kidder, Peabody & Co., Inc.*, NYLJ, June 6, 1994 [Sup Ct New York County 1994] [Stecher, J.] ["Beyond that, to have two arbitrations before different panels of arbitrators, involving identical issues, risks inconsistent awards and, therefore, inconsistent judgments, a result Courts uniformly abhor."]. Our judicial system is exposed to ridicule when two adjudicating bodies - - whether juries, arbitrators, or appellate panels - - arrive at contradictory results. One such highly embarrassing case was brought to light by a tenacious journalist for the *New York Law Journal*, where two different panels reviewing the same evidence on the legality of a warrantless search arrive at diametrically opposite conclusions, when each of two convicted defendants brought their cases for review. Daniel Wise, "1 Case, 2 Appeals, 2 Rulings: How Come? First Department Fail-Safe Measures Fail in Contradictory Decisions in Criminal Case," NYLJ, May 7, 1990 at 1, col. 5 ["a slip-up of this magnitude is highly unusual," but the make-up or composition of the appellate panels and the attorneys' presentations affected the two contradictory results], discussing the contradictory results reached under the same set of facts in *People v. Andujar*, 160 AD2d 403 [1<sup>st</sup> Dept. 1990] and *People v. Mato*, 160 AD2d 435 [1<sup>st</sup> Dept. 1990].

This Court, in the present action, prefers to order a joint trial rather than have the specter of a race to a fact-finder between the two actions, regarding the same facts, where the party that wins the trial of the first case to arrive at a verdict can invoke principles of res judicata and collateral estoppel against the other party.

Especially where the Kings County action will appear for the first time in JCP1 on Sep.

15, 2009, and the EBTs in the Queens County action are expected to occur at the same time, Mr. Rooney has failed to show that Elaine Brown will suffer significant prejudice if a joint trial is ordered. By transferring the Queens County action to Kings County, the judges of Supreme Court, Kings County will effectively be able to monitor the discovery of this action and to expedite all discovery so that it can join the trial that Mr. Rooney is anxious to commence.

The motion by the Islams is directed to the extent of ordering a joint trial. The Queens County action is also transferred to Kings County. It is further ordered that the Clerk of Queens County, upon being served with a copy of this Order with Notice of Entry, is directed to transfer all papers to the Clerk of Supreme Court, Kings County, to be tried jointly with the action *Elaine Brown v. Kazi Islam*, already filed in that court under Index Number 9972/2007. A separate note of issue and filing fee shall be paid by the plaintiffs in this case that is being transferred when it is ready to be tried in Kings County.

Mr. Green's office, within 40 days, shall serve notice of entry together with a stamped copy of this decision bearing the Clerk's date stamp upon all parties in both actions and the Clerk of Queens County and the Clerk of Kings County. Since the Kings County action is being called in JCP1 tomorrow, the undersigned has asked Howard L. Wieder, Esq., my Principal Law Clerk, to send copies of this decision and order to all counsel in both actions by both email and fax. Counsel shall hand tomorrow a copy of this decision and order to the presiding judge of JCP1.

This Court further orders Mr. Green's law office to be present in the trial assignment or scheduling part in Supreme Court, Kings County on Tuesday, September 15, 2009, at 9:30 A.M. sharp to present the presiding judge of that part with a copy of this decision and order.

The foregoing constitutes the decision, order, and opinion of the Court.

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Hon. Charles J. Markey  
Justice, Supreme Court, Queens County

Dated: Long Island City, New York  
September 14, 2009

**Appearances:**

**For Kazi Islam and Shamin-Peroïn Islam:** Eric H. Green, Esq., by Marc Gertler, Esq., 295 Madison Avenue, 16<sup>th</sup> floor, New York, N.Y. 10017

**For Elaine Brown in the Kings County action:** Sean H. Rooney, Esq., 189 Montague St., suite 510, Brooklyn, NY 11201

**For Elaine Brown in the Queens County action:** Mendolia & Stenz, by Maria C. Gutier, Esq., 875 Merrick Ave., Westbury, NY 11590