

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: Honorable LAWRENCE V. CULLEN
Justice

IAS PART 6

-----X

KENNETH APPEL and DIANE BERG-APPEL,

Index No.: 22370/04

Plaintiffs,

Motion Date: 9/11/07

-against-

Motion Cal. No.: 2 & 3

DOUGLAS DIETETICH, M.D.

Motion Sequence No.: 1 & 2

Defendant.

-----X

The following papers numbered 1 to 19 read on this motion by defendant to dismiss plaintiff's action for failure to timely substitute the deceased plaintiff with the Estate Representative; and on a motion by plaintiff for consolidation and change of venue to the Bronx, and cross motion by defendant for consolidation and transfer of the Bronx action to this Court.

PAPERS
NUMBERED

Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
Affirmation in Opposition-Exhibits.....	5 - 6
Reply Affirmation-Exhibits.....	7 - 8
Notice of Motion-Affirmation-Exhibits-Service.....	9 - 12
Notice of Cross Motion-Affirmation-Exhibits.....	13 - 15
Affirmation in Support of Cross Motion.....	16
Affirmation in Opposition.....	17
Reply Affirmation-Exhibit.....	18 - 19

This is an action for medical malpractice. The underlying action was commenced in October 2004, and shortly thereafter the plaintiff, KENNETH APPEL, passed away. In or about February 2005 the plaintiff, DIANE BERG-APPEL, was issued Letters Testamentary. Thereafter, in October 2006, the plaintiff commenced a separate medical malpractice in Supreme Court, Bronx County, under Index No.: 22857/06.

The defendant, DOUGLAS DIETETICH, M.D. ("hereinafter referred to as "DR. DIETETICH"), moves for an Order, pursuant to CPLR §1021, dismissing the plaintiff's action on the merits with prejudice for the failure to timely substitute the deceased plaintiff with the Estate Representative. The plaintiff opposed same and the defendant replied.

In a separate motion, the plaintiff moved for an Order, pursuant to CPLR §602(b), consolidating the instant action with the Supreme Court, Bronx County action; changing venue of the instant action to Bronx County; and amending the caption accordingly. The defendant, in the event defendant's motion to dismiss is not granted, cross moved for an Order, pursuant to CPLR §602(a), consolidating this instant action with the Supreme Court, Bronx County action, however for venue to remain in Queens County. There was an Affirmation in support of defendant's cross motion submitted by several of the defendants in the Bronx County action. The plaintiff opposed and the defendant replied.

First this Court will address the motion to dismiss. Defendant argues that the delay of the plaintiff to move for substitution (a period of more than two years), for which the plaintiff has presented no reasonable excuse, prejudices the defendant. The alleged prejudice is that memories fade and it will be burdensome, if not impossible, to continue to defend such a matter.

The plaintiff, in response, provides an extensive list of investigative procedures that have been conducted, including but not limited to the receipt and review of medical records by expert medical witnesses, and the exhumation and subsequent autopsy performed as a result of same. Further, plaintiff argues there is no prejudice to defendant in that the case will mainly involve the review of medical records, and not witnesses' memories.

CPLR §1021 provides, in pertinent part:

“A motion for substitution may be made by the successors or representative of a party or by any party. If a person who should be substituted does not appear voluntarily he may be made a party defendant. If the event requiring substitution occurs before final judgment and substitution is not made within a reasonable time, the action may be dismissed as to the party for whom substitution should have been made, however, such dismissal shall not be on the merits unless the court shall so indicate... Whether or not it occurs before or after final judgment, if the event requiring substitution is the death of a party, and timely substitution has not been made, the court, before proceeding further shall, on such notice as it may in its discretion direct, order the persons interested in the decedent's estate to cause why the action or appeal should not be dismissed.” [CPLR §1021]

Factors for the court to consider on a motion to dismiss for failure to substitute include the extent of prejudice to the other parties, the excuse proffered for the delay, the merits of the plaintiff's claim, and the “strong public policy” favoring disposal of cases on the merits. (Egrini v. Brookhaven Memorial Hosp., 133 A.D.2d 610, 519 N.Y.S.2d 716 [2nd Dept. 1987]).

In medical malpractice cases, courts have found that there was no prejudice to defendant since it appears that the case will turn mainly on medical records, rather than witnesses' memories. (Jankie-Alli v. Mount Sinai Medical Center, 262 A.D.2d 188; Noriega v. Presbyterian Hospital in the City of New York, 305 A.D.2d 220).

Plaintiff's detailed recitation of actions taken since the decedent's demise constitutes a reasonable excuse for any delay herein. In addition, plaintiff has established by the submission of an affidavit by a medical expert that she has a meritorious claim. On the contrary, defendant failed to allege prejudice which would warrant a disposition of this case on the merits.

Accordingly, based upon the foregoing, the defendant's motion to dismiss is hereby denied.

With respect to plaintiff's request for consolidation, it appears that not only the defendant in the instant matter consents to same, but also several of the defendants in the Bronx County action subject to the requested consolidation, consent. Accordingly, this Court must determine the venue of the consolidated action.

Plaintiff requests that the venue be changed to Bronx County. The basis of plaintiff's request is that plaintiff decedent died in Calvary Hospital, and two of the physicians who treated decedent are situated in Bronx County. Plaintiff further states that none of the medical treatment rendered to decedent was in Queens County, and therefore Bronx is a more convenient venue for the defendants.

Defendant opposes arguing that the plaintiff has failed to establish any grounds to circumvent the general rules that cases shall be consolidated in the county in which the first action was commenced; or that venue shall be designated based upon the residence of a party (herein the plaintiff resides in Queens County). Defendant further asserts that the plaintiff did not meet the burden of establishing inconvenience of material witnesses.

In order for venue to be changed based upon "inconvenience" of witnesses, there are certain requirements which must be met, which include but are not limited to the submission of the names, addresses, occupations of said witnesses, together with disclosure of the facts to which the witnesses will testify. (O'Brien v. Vassar Brothers Hospital, 207 A.D.2d 169 [2nd Dept. 1995]).

Other than general assertions of inconvenience, the plaintiff has not met her burden to warrant a change of venue of this action to Bronx County. Accordingly, that branch of plaintiff's motion seeking transfer to Bronx County is denied.

Based upon the foregoing, it is hereby

ORDERED that defendant's motion to dismiss is hereby denied; and it is further

ORDERED that the plaintiff shall, within thirty (30) days of service of notice of entry of this Order, seek an Order of Substitution, pursuant to CPLR §1021; and it is further

ORDERED that plaintiff's motion for consolidation is hereby granted to the extent that the action entitled "Diane Berg-Appel, as Executrix of the Estate of Kenneth J. Appel, and Diane Berg-Appel, Individually v. Leonard B. Saltz, M.D., Alma Carrington, M.D., Allen Chefitz, M.D., Memorial Hospital for Cancer and Allied Diseases, and Calvary Hospital", Supreme Court, Bronx County, Index No.: 22857/06, is hereby consolidated for all purposes with this action, under Index No. 22370/04; and it is further

ORDERED, that the Clerk of the Supreme Court of the County of Bronx, upon being served with a certified copy of this Order with notice of entry, pursuant to CPLR 602, is directed to transfer all papers on file in action bearing Index No.: 22857/06 to the Clerk of the Supreme Court of Queens County to be consolidated with this action; and it is further

ORDERED, that the caption of the Consolidated Action shall be:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
DIANE BERG-APPEL, AS EXECUTRIX OF THE
ESTATE OF KENNETH APPEL, and DIANE
BERG-APPEL, Individually,

Plaintiffs,

Index No.: 22370/04

-against-

DOUGLAS DIETETICH, M.D., LEONARD B.
SALTZ, M.D., ALMA CARRINGTON, M.D.,
ALLEN CHEFITZ, M.D., MEMORIAL HOSPITAL
FOR CANCER AND ALLIED DISEASES, and
CALVARY HOSPITAL,

Defendants.

-----X

and it is further

ORDERED, that a copy of this Order with notice of entry be served on all parties to the actions consolidated, the Clerk of the Supreme Court, Queens County, the Clerk of the Supreme Court, Bronx County, and at the time of filing of the Note of Issue, on the Clerk of the Trial Term office.

Dated: January 11, 2008

LAWRENCE V. CULLEN, J.S.C.