

NO. 2022-35172

J&T CHIROPRACTIC, PLLC a/k/a J&T CHIROPRACTIC, LLC.	§	IN THE DISTRICT COURT OF
	§	
Plaintiff	§	
	§	
VS.	§	HARRIS COUNTY, TEXAS
	§	
LAW OFFICE OF MERICK NEPOMUCENO, P.C. d/b/a LAW OFFICE OF MERICK NEPOMUCENO and EMMERICO T. NEPOMUCENO a/k/a MERICK NEPOMUCENO	§	
	§	
Defendant	§	127TH JUDICIAL DISTRICT

**DEFENDANTS' MOTION TO CONSOLIDATE
OR IN THE ALTERNATIVE, MOTION TO ABATE**

COME NOW, Defendants Law Office of Merick Nepomuceno, P.C. d/b/a Law Office of Merick Nepomuceno, Emmerico T. Nepomuceno a/k/a Merick Nepomuceno and file this Motion to Consolidate or in the Alternative, Motion to Abate, and would show this Court as follows:

I. RELIEF SOUGHT

Defendants seek consolidation of this case with Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C Chiropractic, PLLC*, In the 152nd Judicial District Court, Harris County, Texas, or in the alternative, abatement of this case. Defendants filed a Motion to Consolidate in the 152nd Judicial District Court prior to the filing of this motion, in accordance with Harris County Local Rule 3.2.3.

II. BACKGROUND

Plaintiff herein is J&T Chiropractic, PLLC a/k/a J&T Chiropractic, LLC (“J&T Chiropractic”). On or about April 17, 2022, a lawsuit styled Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C*

Chiropractic, PLLC, In the 152nd Judicial District Court, Harris County, Texas (“*J&T v. Nguyen*”) was filed. According to the live pleading in *J&T v. Nguyen*, J&T Chiropractic was formed in 2018 and owned, operated, or staffed by some combination of Jonathan E. Bittick D.C. (“Bittick”) and Thy Ngoc (“Tony”) Nguyen D.C. During its existence, multiple clients of Defendant Nepomuceno received treatment for personal injuries from J&T Chiropractic. Nguyen took the lead for J&T in handling the business dealings with Nepomuceno.

According to pleadings in *J&T v. Nguyen*, Bittick and Tony had a falling out in approximately 2021. J&T’s counsel in this case was somehow involved in negotiating or “papering” some form of agreement whereby Bittick and Tony split up the business. Bittick later accused Tony of violating the terms of the agreement.

J&T Chiropractic is represented by the same counsel in both cases. The following allegations appear in J&T Chiropractic’s current live pleading in *J&T v. Nguyen*:

- Bittick and Tony were to share equally in the profits of J&T Chiropractic (Plaintiff’s Amended Petition, Exhibit A, paragraph 10.)
- Bittick and Tony were to share management responsibilities, with Tony focusing on marketing (Plaintiff’s Amended Petition, Exhibit A, paragraph 11.)
- Bittick discovered financial mismanagement by Tony in late 2021, approximately three years after the business opened (Plaintiff’s Amended Petition, Exhibit A, paragraph 13.)
- Tony intercepted funds sent to J&T from multiple attorneys and deposited same into Tony’s personal bank account (Plaintiff’s Amended Petition, Exhibit A, paragraph 13.)
- Bittick alleges that he and Tony entered into a settlement agreement which provided, in part, for Nguyen’s payment of \$50,000 to Bittick, and 50% of any receivables

identified by Bittick as having been delivered to Nguyen but not tendered to J&T Chiropractic (Plaintiff's Amended Petition, Exhibit A, paragraph 17.)

- Bittick goes on to allege that Tony failed to pay the \$50,000 payment to Bittick and breached other terms of the agreement. (Plaintiff's Amended Petition, Exhibit A, paragraph 19.)
- Bittick then alleges that Bittick "confronted Nguyen who restated his commitment to abide by the Settlement Agreement" and that Tony "paid the Settlement Agreement and agreed to stop interfering with J&T's business." (Plaintiff's Amended Petition, Exhibit A, paragraph 22.)
- Bittick alleges that Tony continued to divert funds, failed to account, intercepted checks delivered to J&T's address, and continued to interfere with J&T's business. (Plaintiff's Amended Petition, Exhibit A, paragraph 24.)
- Bittick alleges he demanded that Tony cooperate in reconciling J&T's invoices and payments, including providing Dr. Bittick and J&T all documents and communications regarding J&T patients in Tony's possession, custody or control."
- Bittick and J&T continue to prosecute their case against Tony and his business, T&C Chiropractic, PLLC, alleging breach of contract, breach of fiduciary duty, conversion, and theft (Plaintiff's Amended Petition, Exhibit A, paragraphs 27-49.)¹

On or about June 13, 2022, approximately two months after Plaintiffs' original petition was filed in *J&T v. Nguyen*, J&T filed this case against Nepomuceno. The petition was amended on August 1, 2022. The Amended Petition includes the following factual allegations:

¹ In fact, the litigation against Nguyen has also spiraled into federal court due to allegations of copyright infringement. See Cause No. 4:22-CV-03285, *J&T Chiropractic, PLC, a/k/a J&T Chiropractic, LLC v. T&C Chiropractic, LLC f/k/a T&C Chiropractic, PLLC, and Thy Ngoc Nguyen*, in the United States District Court, Southern District of Texas, Houston Division.

- Defendants referred personal injury clients to J&T Chiropractic for treatment (Plaintiff's Amended Petition, Exhibit B, paragraph 9.)
- Defendants confirmed that payment would be made to J&T Chiropractic out of the client/patient's personal injury recovery subject to written letters of protection (Plaintiff's Amended Petition, Exhibit B, paragraph 1.)
- Defendants have failed or refused to honor their clients' assignments of benefits when Defendants resolved personal injury claims brought by clients/patients. (Plaintiff's Amended Petition, Exhibit B, paragraph 13.)

J&T alleges breach of contract, quantum meruit, and money had and received. Defendants filed their original answer alleging, among other things, payment, accord and satisfaction, and waiver.

Defendant herein contends that payment was made on the vast majority of the accounts at the direction of Tony, who accepted funds. Defendant asserted the following defenses in its Original Answer:

- Plaintiff's claims are barred in whole or in part due to payment. On information and belief, payment was made on one or more of the accounts, which are not specifically alleged in Plaintiff's Original Petition. (Defendants' Original Answer, Exhibit C, paragraph 6.)
- Plaintiff's claims are barred in whole or in part due to accord and satisfaction. On information and belief, one or more obligations, which are not specifically alleged in Plaintiff's Original Petition, have been satisfied. (Defendants' Original Answer, Exhibit C, paragraph 7.)
- Plaintiff's claims are barred in whole or in part due to waiver. On information and

belief, one or more obligations, which are not specifically alleged in Plaintiff's Original Petition, have been waived. (Defendants' Original Answer, Exhibit C, paragraph 8.)

III. EVIDENCE IN SUPPORT

The following evidence is included in support of this Motion:

- A. Plaintiff's First Amended Petition in Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C Chiropractic, PLLC*, In the 152nd Judicial District Court, Harris County, Texas, attached as Exhibit A.
- B. Plaintiff's First Amended Petition herein, attached as Exhibit B.
- C. Defendants' Original Answer herein, attached as Exhibit C.

IV. ARGUMENT AND AUTHORITIES

Defendants seek consolidation of this case with Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C Chiropractic, PLLC*, In the 152nd Judicial District Court, Harris County, Texas, or in the alternative, abatement of this case.

Motion to Consolidate

Consolidation of cases is appropriate if (1) the cases relate to substantially the same subject matter, transaction, or occurrence and involve common questions of law or fact, (2) the same evidence is material, relevant, and admissible in both cases, (3) consolidation promotes judicial economy and convenience, and (4) consolidation will not result in an unfair trial. *See* Tex. R. Civ. P. 174(a); *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 207 (Tex. 2004); *Lone Star Ford, Inc. v. McCormick*, 838 S.W.2d 734, 737–38 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

- A. Same subject matter, transaction or occurrence, questions of law or fact**

The Court should consolidate this case with *J&T v. Nguyen* because the cases arose from the same subject matter, transaction or occurrence and involve common questions of law and fact. Both cases arise out of the business dealings between J&T Chiropractic and Defendant. Defendants Dr. Jon Bittick and Dr. Tony Nguyen were vice-principals in J&T Chiropractic. Defendant would, at the request of Tony, negotiate reductions in medical billing for J&T's services, and collect payment. Defendant would make payments to Tony as directed by Tony in satisfaction of J&T invoices. In the instant case, J&T apparently claims that there were no agreed reductions and that the payments should not have been made to Tony, or should not have been made according to Tony's instructions, but should instead have been made payable to J&T. Accordingly, the same subject matter and transactions are at issue in both cases.

In *J&T v. Nguyen*, Bittick and J&T claim that payments should have been made to J&T for J&T services, not to vice-principle Tony. Thus, common issues of law and fact in both cases include Tony's authority to receive payment, Bittick and J&T's knowledge of and acceptance of Tony's practice of accepting payment, Tony's authority to agree to reductions of invoices on behalf of J&T, and whether Defendant paid the correct person, the correct amount, and whether payments made by Defendant satisfied the outstanding debt. Thus, both cases involve common questions of law and fact.

B. The same evidence is material, relevant, and admissible in both cases

In a consolidated trial of these cases, the evidence presented will be material, relevant, and admissible in each case. Evidence of the terms of the management agreement or other understanding pertaining to operation of the LLC will be relevant to Bittick, J&T and Tony's rights to collect the money Defendant offered to pay for J&T's services to Defendant's clients.

The actual payments made by Defendant, to whom they were paid, and the agreements reached regarding the amount to be paid for each patient will also be material, relevant, and admissible in both cases.

C. Consolidation promotes judicial economy

The consolidation of these cases promotes judicial economy and convenience. Discovery will be facilitated, as the same accountings, bank records, checks, agreements, and patients/clients are involved. The potential for inconsistent adjudications of factual and legal issues will be avoided, and witnesses who might be required to testify in both trials can testify in only one. The expense of presenting expert witnesses will be halved.

Judicial economy is significantly enhanced through consolidation of these cases because there are agreed protective orders in both cases that will act to hamper discovery of facts revealed in the other case. By way of example, multiple subpoenas for records have been issued in *J&T v. Nguyen*. At least one has been issued to another personal injury law firm which likely negotiated medical bills and paid medical bills out of settlements in the process of doing business with J&T Chiropractic. J&T Chiropractic's dealings with another personal injury law firm may be admissible in both cases, but undiscoverable without a Court order that supercedes the agreed protective order(s). Judicial economy is also improved because the privacy rights of hundreds of patients will be protected in one case, rather than separately subject to disclosure in two cases.

D. Consolidation will not result in an unfair trial

Consolidation will not result in an unfair trial. There will be no jury confusion of the issues or prejudice to the parties. In fact, jury confusion on the subject of why Tony is not a party to the instant case will be avoided altogether. And rather than prejudice to the parties,

prejudice is actually avoided: if the cases are tried separately, to different juries, there is the possibility that one jury could find that Tony had the right to negotiate and collect on behalf of J&T, and the other jury could decide that that he did not have the right to negotiate.

For these reasons, and others that are obvious from a review of the pleadings in both cases, Defendants request that this case be consolidated with Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C Chiropractic, PLLC*, In the 152nd Judicial District Court, Harris County, Texas.

Alternative Motion to Abate

Pleading in the alternative, Defendants seek abatement of this case on three grounds. First, abatement is necessary because the same dispute is pending in another Texas court. Second, there is a defect in the pleadings supported by extrinsic evidence, as a necessary party is absent from this case. Third, the equities strongly favor abatement.

A. Same Dispute Pending in Another Texas Court.

Defendant has provided discovery responses demonstrating that money was paid to multiple different payees in satisfaction of fees incurred by Nepomuceno clients for treatment at J&T Chiropractic. Thus, the same dispute over the payment of client accounts has been cast differently in two lawsuits pending simultaneously in Harris County, Texas: Bittick and J&T claim that Tony stole, diverted, converted, or absconded with money owed to J&T and Bittick in Cause No. 2022-23114 pending in the 152nd Judicial District Court. In the instant case, J&T contends that Nepomuceno did not pay money owed to J&T, when, in fact, Nepomuceno paid money to J&T in satisfaction of outstanding amounts at the request of Tony, one of its owners. Thus, the same dispute regarding payment, and what constitutes payment, is pending in two Courts, and there is a defect in parties.

B. Absence of a Necessary Party

Plaintiffs Bittick and J&T Chiropractic originally filed suit in Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C Chiropractic, PLLC*, In the 152nd Judicial District Court, Harris County, Texas. Plaintiffs therein allege that Thy Ngoc Nguyen, an owner of J&T Chiropractic, diverted, converted, stole, or misdirected money that was paid or made payable to J&T Chiropractic. Subsequently, J&T Chiropractic filed suit in the instant case, claiming nonpayment of monies owed to J&T Chiropractic by Nepomuceno. Nepomuceno alleges that virtually all of the money allegedly owed to J&T Chiropractic was paid to Thy Ngoc “Tony” Nguyen during the time Tony was an owner of J&T Chiropractic. Accordingly, Thy Ngoc “Tony” Nguyen in his individual capacity, and in his capacity as an owner or principal in J&T Chiropractic, is a necessary party to this case. Further, to the extent Bittick, personally, is a proper party to the case currently pending in the 152nd Judicial District Court, and pertaining to the same subject matter, Bittick, personally, is a necessary party to this case as well.

C. Equity Favors Abatement

There are multiple equitable reasons that abatement is proper and equitable, including the following:

There is a protective order in Cause No. 2022-23114 pending in the 152nd Judicial District Court which limits defendants access to discovery in the related case. Such discovery is likely duplicative of, or relates to facts bearing on the instant litigation, such as payment of outstanding fees, the identity of those who were entitled to collect and distribute fees, direction and misdirection of payment, additional law firms and related disputes concerning payments for J&T clients, defenses such as accord and satisfaction and even apparent authority.

At the heart of the dispute herein is a “business divorce” that is ongoing, and the subject of the divorce, payment of money, receipt of money, and improper operation of the business, are inherently intertwined with the defenses Defendant seeks to assert in this case. By way of example, the nature and extent of Bittick’s and Tony’s ability to negotiate fees, accept payment, deposit payments, and receive payment, is apparently a primary subject in their dispute. The resolution of those issues will significantly impact Nepomuceno’s defenses at trial. For example, if Tony had the right or apparent authority to accept payment from Nepomuceno on client accounts, or the right or apparent authority to negotiate reductions in fees, or a duty to pay J&T Chiropractic the funds he received from Nepomuceno, Nepomuceno’s payments on behalf of clients would satisfy obligations owed to J&T Chiropractic.

The dispute in Cause No. 2022-23114 pending in the 152nd includes a challenge to the enforceability of the settlement and disassociation agreements that are a part of the business divorce. The outcome of that litigation, on that issue, may impact who Nepomuceno may have to pay for any damages alleged herein.

Both lawsuits appear to seek the same damages, giving rise to the potential for a double recovery. If a jury finds that Tony owes Bittick and J&T Chiropractic all of the money for client accounts as asserted in Cause No. 2022-23114 pending in the 152nd Judicial District Court, and Nepomuceno is determined to have incorrectly or improperly paid Tony, J&T may succeed in obtaining a double recovery of the same alleged debts.

J&T has already submitted a spreadsheet to opposing counsel that includes information on more than two-hundred individuals named by Plaintiff as prior patients of J&T that were also clients of Defendants. J&T subsequently identified with more than one hundred names in

addition to the first list they provided. It stands to reason that J&T Chiropractic should first “get its house in order” and identify the J&T clients who were also clients of Nepomuceno, settle the issue of Tony’s and Bittick’s rights in regards to J&T Chiropractic, and focus any discovery directed to Nepomuceno to include only those issues which cannot be resolved in Cause No. 2022-23114 pending in the 152nd Judicial District Court.

A significant amount of the information sought through discovery in this case should be in the possession of J&T Chiropractic, an entity already embroiled in litigation. Resort to a lawsuit against a third party as a means of obtaining information which should otherwise be available to the parties in an earlier filed case runs counter to generally accepted principles of judicial economy.

V. PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendants Law Office of Merick Nepomuceno, P.C. d/b/a Law Office of Merick Nepomuceno, Emmerico T. Nepomuceno a/k/a Merick Nepomuceno respectfully request that this Court consolidate this case with Cause No. 2022-23114, *J&T Chiropractic, PLLC and Jonathan E. Bittick, D.C. v. Thy Ngoc Nguyen and T&C Chiropractic, PLLC*, In the 152nd Judicial District Court, Harris County, Texas, or in the alternative, abate this case, and require Plaintiff to cure the defect in pleadings, and grant Defendants such other and further relief to which they may show themselves justly entitled.

Respectfully submitted,

Martin, Disiere, Jefferson & Wisdom, L.L.P.

/s/ Raul H. Suazo

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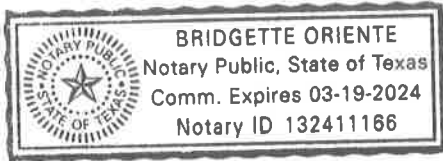
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NEPOMUCENO**

VERIFICATION

I hereby certify and swear under oath that the facts stated in Section II and the Motion to Abate are true and correct and within my personal knowledge. I am over the age of 18 and competent to give this sworn verification.

Emmerio T. Aguilera

SUBSCRIBED AND SWORN BEFORE ME, the undersigned notary public, on this the 2nd day of February, 2023.



[Signature]

Automated Certificate of eService

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