

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D25267  
Y/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - October 28, 2009

MARK C. DILLON, J.P.  
HOWARD MILLER  
RANDALL T. ENG  
L. PRISCILLA HALL  
SANDRA L. SGROI, JJ.

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2009-00253

DECISION & ORDER

Herbert Thomas, respondent, v Veeranjanya V.  
Guttikonda, et al., appellants, et al., defendants.

(Index No. 9143/08)

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McAloon & Friedman, P.C., New York, N.Y. (Wayne M. Roth of counsel), for appellants.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York, N.Y. (Rhonda E. Kay of counsel), for respondent.

In an action to recover damages for medical malpractice, the defendants Veeranjanya V. Guttikonda, Mahrous F. Tobia, Sameh S. George, Eric Thantun, and the Seaview Medical Anesthesia Group appeal, as limited by their brief, from so much of an order of the Supreme Court, Kings County (Dabiri, J.), dated November 21, 2008, as denied their motion to change the venue of the action from Kings County to Richmond County pursuant to CPLR 510 and 511.

ORDERED that the order is affirmed insofar as appealed from, with costs.

A demand to change venue based on the designation of an improper county (*see* CPLR 510[1]) “shall be served with the answer or before the answer is served” (CPLR 511[a]). Since the appellants failed to serve a timely demand for a change of venue and failed to make a motion within the 15-day period required under the statute (*see* CPLR 511[b]), they were not entitled to change the venue of this action as of right (*see Baez v Marcus*, 58 AD3d 585, 586; *Jeffrey L. Rosenberg & Assoc., LLC v Lajaunie*, 54 AD3d 813, 816; *Obas v Grappell*, 43 AD3d 431). Thus, their motion

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“became one addressed to the court’s discretion” (*Callanan Indus. v Sovereign Constr. Co.*, 44 AD2d 292, 295; *see Baez v Marcus*, 58 AD3d at 586; *Jeffrey L. Rosenberg & Assoc., LLC v Lajaunie*, 54 AD3d at 816; *Obas v Grappell*, 43 AD3d at 432). While the appellants contend that their noncompliance with the time limit should be overlooked since they moved promptly after discovering the purported true residence of the defendant Edwin M. Chang, there was no evidence of any willful omissions or misleading statements regarding Chang’s residence by the plaintiff (*see Joyner-Pack v Sykes*, 30 AD3d 469; *P.T.R. Co. v Teitelbaum*, 2 AD3d 609, 610; *Pittman v Maher*, 202 AD2d 172, 175; *cf. Horowicz v RSD Transp.*, 249 AD2d 511). Accordingly, the Supreme Court providently exercised its discretion in denying that branch of the appellants’ motion which was to change the venue of this action pursuant to CPLR 510(1).

The Supreme Court providently exercised its discretion in denying that branch of the appellants’ motion which was to change the venue of this action pursuant to CPLR 510(3) since the appellants failed to demonstrate that “the convenience of material witnesses and the ends of justice [would] be promoted by the change” (*O’Brien v Vassar Bros. Hosp.*, 207 AD2d 169, 171, quoting CPLR 510[3]).

DILLON, J.P., MILLER, ENG, HALL and SGROI, JJ., concur.

ENTER:



James Edward Pelzer  
Clerk of the Court