

Montan v Saint Vincent's Catholic Med. Ctr.

2007 NY Slip Op 30692(U)

April 9, 2007

Supreme Court, New York County

Docket Number: 0110497/2005

Judge: Sheila Abdus-Salaam

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. SHEILA ABDUS-SALAAM
Justice

PART 13

Francisca Montan

INDEX NO. 110497/05

MOTION DATE 2/22/07

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

FILED
APR 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

- v -
Saint Vincent's Catholic Medical Center,

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by defendant St. Vincent's Medical Center and the cross-motion by defendant Tallaj for an order changing the venue of this action from Bronx County to New York County, are denied.

St. Vincent's had previously filed a motion to change venue on the ground that Bronx County was not a proper county in that none of the parties reside in that county and that plaintiff and the hospital are residents of New York County. Defendant Tallaj filed an affirmation in support of that motion. The motion was marked withdrawn without prejudice due to the automatic stay put in place upon the bankruptcy filing of St. Vincent's. That stay has now been lifted and the defendants have renewed their request for a change of venue to New York County.

The record shows that on July 8, 2005, St. Vincent's served plaintiff with a demand for a change of place of trial to New York County. Plaintiff

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

did not oppose that demand by an affidavit pursuant to CPLR 511 (b) showing that her choice of venue was proper, but instead sent a letter from counsel stating that the demand for a change of venue was denied. St. Vincent's filed its motion to change venue on July 28, 2005.

In opposition to the motion, plaintiff argues that the motion is untimely in that it was not made within 15 days after service of the demand to change venue, and that in any event, venue is proper in Bronx County because plaintiff resided in that county at the time that the action was commenced. Regarding the timeliness of the motion, defendant St. Vincent's argues that because it served its demand for a change of venue by mail, the five days for plaintiff to respond pursuant to CPLR 511 (b) is extended to 10 days pursuant to CPLR 2103 (b) (2), and that defendant also should have the benefit of an additional five days, for a total of 20 days, to move to change the place of trial. Under that scenario, the motion was timely.

Plaintiff strenuously opposes the application of CPLR 2103 (b) to this situation, and cites the First Department's holding in Thompson v. Cuadrado (277 AD2d 151 [2000]) that the five day extension for service of papers does not benefit the party making service by mail. However, there is support for defendant's argument that it should be afforded an additional five days to move for a change of venue (see West's McKinney's Forms Civil Practice Law and Rules § 2:404). And, the Thompson case did not involve a situation where defendant needed to see if there would be a response from plaintiff before it filed a motion for relief. Rather, Thompson dealt with a motion to dismiss the affirmative defense of lack of jurisdiction pursuant to CPLR 3211 (e). In contrast with Thompson, the defendant here served a demand for a change of venue by mail, so plaintiff had 10 days to respond. If defendant were held to the 15 days set forth in CPLR 511 (b), then it is conceivable that defendant would have only a few days after receiving plaintiff's response to assemble and file the motion for a change of venue.

In any event, even assuming for the sake of argument that this motion

* 3]

is timely, defendant has not shown that Bronx County is an improper venue. Plaintiff has submitted a copy of a lease for an apartment in the Bronx during the relevant period, and affidavits by her and her mother support her contention that she resided in Bronx County when this action was commenced. The affidavit of the superintendent of the Bronx apartment proffered by defendant does not indicate that plaintiff did not reside in that apartment when this action was commenced in May 2005. Nor does the affidavit from St. Vincent's General Counsel, Mr. Hoering, show that plaintiff did not reside in Bronx County in April 2005. He states that he has examined plaintiff's medical records from St. Vincent's and a St. Vincent's clinic, and that on occasions between January 2000 and October 2004, plaintiff filled out a form indicating that she lived at Post Avenue in Manhattan. As this court pointed out to counsel during oral argument of this motion, there was no proof that plaintiff had been the one filling out those forms reviewed by Mr. Hoering¹. Additionally, the time frame that he identified in his affidavit did not demonstrate that plaintiff resided in Manhattan when this action was commenced in May 2005.

Finally, while the failure of plaintiff to serve an affidavit in response to defendant's demand would support a transfer of venue to the county demanded by defendant if plaintiff had selected an improper venue (see Lynch v. Cyprus Sash & Door Co., Inc., 272 AD2d 260 [2000]), there has not been an improper selection of venue in this instance.

¹To the extent that defendant's sur-reply attempted to address this concern raised by the court and to supplement its submission on this issue, it is improper. The court granted defendant leave to submit a sur-reply only with respect to plaintiff's argument that defendant was not entitled to a five day extension of time to move for a change of venue pursuant to CPLR 2103 (b) (2).

Accordingly, the motion and cross-motion are denied.

Dated: 4/9/07

SA-S

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

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