

M. v Northern Westchester Hosp. Ctr.
2007 NY Slip Op 31593(U)
June 6, 2007
Supreme Court, New York County
Docket Number: 0104876/2006
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

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M., an infant under 14 years of age, by and through
his parents and natural guardians, MARY
SWANSON and BRUCE SWANSON, and MARY
SWANSON and BRUCE SWANSON, individually,

Plaintiffs,

-against-

Index No.: 104876/06
Motion Date: 04/03/07
Mot. Seq. No.: 02

NORTHERN WESTCHESTER HOSPITAL CENTER,
WOMEN'S MEDICAL ASSOCIATES, PLLC, AND
CARLA ENG-KOHN, M.D.,

Defendants.

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PRESENT: EILEEN BRANSTEN, J.

FILED
JUN 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

In motion sequence number 02, defendant Carla Eng-Kohn, M.D. ("Dr. Eng-Kohn") moves to change the venue of this action from New York County to Dutchess County or Westchester County pursuant to CPLR 510(1) or 510(3).

Defendant Women's Medical Associates ("WMA") cross-moves for an order pursuant to CPLR 2221(e) granting leave to renew its prior motion, which unsuccessfully sought to change the venue of this action from New York County to Westchester County. Plaintiffs Mary Swanson ("Mrs. Swanson"), Bruce Swanson and M. ("Baby Swanson") (collectively "Plaintiffs") oppose a venue change and defendant Northern Westchester Hospital Center ("Northern Westchester") supports its co-defendants' motions and the transfer of this case.

Background

In March 2003, Mrs. Swanson obtained obstetrical and other medical care from WMA, which is located in Westchester County. WMA Notice of Cross-Motion to Renew (“WMA Cross”), Ex. A, at 2. Carla Eng-Kohn, M.D. (“Dr. Eng-Kohn”) was an employee of WMA and provided care and treatment to Mrs. Swanson. Dr. Eng-Kohn Affirmation in Support (“Eng-Kohn Supp.”), Ex. B. About seven months later on October 10, 2003, Mrs. Swanson gave birth to Baby Swanson at Northern Westchester, which is also in Westchester County. WMA Cross, Ex. A, at 3. Dr. Eng-Kohn delivered the infant. Eng-Kohn Supp., Ex. B.

In April 2006, Plaintiffs commenced this medical malpractice action against WMA, Dr. Eng-Kohn and Northern Westchester. Eng-Kohn Supp., at 4. In their Summons with Notice, Plaintiffs designated New York County as the place of trial based on the residence of defendant Carla Eng-Kohn, M.D, which was listed as “380 Broome Street, New York, NY 10013.” WMA Cross, Ex. A, at 1.

On June 15, 2006, WMA served a Notice of Appearance, Demand for a Complaint and a Notice to Change Venue from New York County to Westchester County (“Venue Demand”). WMA Cross, at ¶ 3.

A week later, Plaintiffs served a complaint. They allege, among other things, that due to defendants’ negligence in connection with prenatal treatment and Baby Swanson’s

delivery, the infant suffers from shoulder dystocia, brachial plexus injury, Erb's palsy, asymmetric hand/arm movements, cervical hematomas, facial bruising and right-arm bruising. Eng-Kohn Supp., Ex. C, at ¶ 12.

Plaintiffs, however, did not respond to WMA's Venue Demand and, on June 23, 2006 --more than five days after serving its Venue Demand but less than 15 days later--WMA made a timely motion to change the venue of this action to Westchester County, urging that Dr. Eng-Kohn did not reside or practice medicine in New York County at the time the action was commenced. Eng-Kohn Supp., at 5. In support of its motion, WMA submitted Dr. Eng-Kohn's Westchester vehicle and voting registration for the Court's consideration that established residence outside New York County. NWHC Affirmation in Support ("NWHC Supp."), at ¶ 3. WMA did not include an Affidavit from Dr. Eng-Kohn attesting to her residence with its motion.

On October 30, 2006, Justice Milton Tingling denied the motion, concluding:

"Movant fails to state a basis to grant the relief sought. Specifically, Movant does not attach any proof of the alleged residence of the co-defendant on the motion papers to establish New York County as improper."

WMA Cross, Ex. G.

Meanwhile, service was allegedly effective as to Dr. Eng-Kohn on August 3, 2006. Eng-Kohn Supp., at 4. Dr. Eng-Kohn served a verified answer twenty days later on August 23, 2006. That same day, she also served a Demand for Change of Venue on Plaintiffs,

which stated that “defendant Carla Eng-Kohn, M.D. is not a resident of New York County and has not been for several years. Eng-Kohn Supp., Ex. D. Indeed, in response to a Notice to Admit that Plaintiffs served, Dr. Eng-Kohn denied New York residency. *Id.*, at 5.

Analysis

Dr. Eng-Kohn’s Motion Based on Improper Venue

In February 2007, Dr. Eng-Kohn made this motion by Order to Show Cause to change the venue of this action to Dutchess or Westchester counties on the ground that venue is improper. She asserts that at the time the case was commenced, she did not reside in New York County. Dr. Eng-Kohn did not take any position in WMA’s earlier venue-transfer motion because she had not yet been served with the summons with notice or complaint at the time the motion was made and had absolutely no notice of the proceedings.

In support of her motion, Dr. Eng-Kohn submits an affidavit in which she swears under oath:

“The address of 380 Broome Street, New York, NY 10013 was the home of my parents. It is my understanding that they rented the premises, until the time of their deaths in 1999 and 2000, respectively. The Broome Street address was my permanent address until I finished my residency in 1997. I have not resided in New York County since 1997, when I completed the residency and relocated to the Washington, D.C. area. I returned to the state of New York three years later, in the year 2000, when I moved to Westchester County and began practicing medicine in Westchester County.

“Therefore, as I have not resided in New York County since 1997, venue of this case should not have been predicated upon my alleged residency in New York County, which is incorrect. Moreover, I do not own any property in New York County.”

Eng-Kohn Supp., Ex. J.

Plaintiffs oppose Dr. Eng-Kohn’s motion on the ground that it is untimely.

Generally, CPLR 511(b) permits a defendant to move to change venue on the ground that the county chosen by plaintiff is improper if a timely demand is served and thereafter, a motion is made “within fifteen days after service of the demand.” Although Dr. Eng-Kohn timely made a demand for a change of venue, she never followed up with a timely motion after serving her demand for a change of venue to make this motion. Thus, her motion to change venue is denied.*

WMA’s Cross-Motion

Renewal

WMA cross-moves for renewal of its timely motion to change the venue of this case to Westchester County, which was denied on October 30, 2006. WMA explains that it had not submitted an affidavit from Dr. Eng-Kohn in support of its earlier motion because the doctor no longer was its employee and had not yet been served. Now that Dr. Eng-Kohn is

* In light of the disposition of WMA’s cross-motion for renewal and a venue change, there is no need to address whether transfer is warranted based on the convenience of witnesses.

in the mix, new evidence has become available, WMA urges, and it is clear that there is no basis for venue in New York County.

In opposition, Plaintiffs assert that WMA could have obtained an affidavit from Dr. Eng-Kohn but failed to do so. Plaintiffs' Opposition to Renew ("Opp. Renew"), at 3. Plaintiffs argue that granting the motion to renew would "subvert the strict requirements of CPLR 511 by [authorizing] a baseless motion within the 15-day period, and then not submitting any evidence until seven months later." Opp. Renew, at 6. Additionally, they contend that Dr. Eng-Kohn's Affidavit does not change that a "Ms. Wong," who lives at the Broome Street building, confirmed to their process server that Dr. Eng-Kohn lived in Apartment 10 of the premises, and that the Summons and Complaint were mailed to her at this address and were not subsequently returned to the sender. Opp. Renew, at 6 to 7.

CPLR 2221(e) provides that:

"A motion for leave to renew *** shall be based upon new facts not offered on the prior motion that would change the prior determination *** [and] shall contain reasonable justification for the failure to present such facts on the prior motion."

Accordingly, renewal motions should be based on newly discovered facts that could not have been offered on the prior motion. Courts, however, have the discretion to "relax this requirement and to grant such a motion in the interest of justice." *Mejia v. Nanni*, 307 A.D.2d 870, 871 (1st Dept 2003).

For example in *Mejia v. Nanni*, 307 A.D.2d 870--a case strikingly similar to this one-- Supreme Court initially denied a venue-change motion because one of the defendants “failed to submit any affidavit or documentary evidence” establishing his residence outside the county Plaintiffs had chosen. Instead of appealing, defendants sought to revisit the motion, only this time they submitted affidavits and bills demonstrating their residence outside the chosen county. Supreme Court refused to reexamine the motion, explaining that “defendants suggested no excuse for their failure to offer the newly submitted evidence in support of the initial motion.” *Id.*, at 871.

The Appellate Division, First Department unanimously reversed, holding that Supreme Court erred in refusing to grant renewal and in failing to transfer the case. The Appellate Division concluded that, under the circumstances, in the interest of justice the standard for renewal should have been relaxed and because “the only competent evidence” revealed that both defendants resided outside the chosen county, the action should have been transferred to a proper county. *Mejia v. Nanni*, 307 A.D.2d, at 871.

In the interests of justice, this Court will consider the new evidence --Dr. Eng-Kohn’s affidavit. At the outset, Dr. Eng-Kohn had not been served at the time of the underlying motion. Furthermore, WMA explained that it had not submitted Dr. Eng-Kohn’s Affidavit with its original motion because she was “no longer affiliated with [WMA] and had not yet

appeared in this action,” thereby making it “impossible for counsel to obtain an Affidavit from her.” WMA Cross, at 13; Northern Westchester Affirmation in Support, at ¶ 3.

Disclosure in this action, moreover, has not proceeded. Therefore, this case is still at a very early stage and the rationale underlying the timing requirements of CPLR 511 would not be undermined by renewal at this juncture.

Improper Venue

Upon renewal, WMA seeks transfer of this action to Westchester County on the ground that venue is improper in New York County.

CPLR 510(1) sets forth that a court, “upon motion, may change the place of trial of an action where “the county designated for that purpose is not a proper county.” CPLR 503(a), in turn, makes plain that “the place of trial shall be in the county in which one of the parties resided when it was commenced.”

Defendants have established through competent evidence that Dr. Eng-Kohn did not live in New York County at the time this action was commenced. In response, all Plaintiffs put forth is that Ms. Wong (whose affidavit has not been supplied to the Court) told their process server that at the time of service Dr. Eng-Kohn lived at the Broome Street building and that papers they mailed to that address were not returned. Opp. Renew, Ex. A.

Plaintiffs’ arguments do not refute Dr. Eng-Kohn’s sworn testimony. In response to WMA’s showing, Plaintiffs offer no official documentation or direct proof that Dr. Eng-

Kohn in fact resided at the address listed on the Summons With Notice when the action was commenced. Thus, the venue Plaintiffs chose was improper and the case must be transferred to Westchester County. *See, Mejia v. Nanni*, 307 A.D.2d, at 871. Because this case is being transferred pursuant to CPLR 511 and 510(1), there is no need to address WMA's argument concerning the convenience of the witnesses.

Accordingly, it is

ORDERED that Dr. Eng-Kohn's motion to change venue from New York County to either Dutchess County and/or Westchester County is denied; and it is further

ORDERED that WMA's cross-motion change to renew is granted and upon renewal it is ordered that the Decision and Order dated October 30, 2006 is vacated upon renewal; and it is further

ORDERED that the venue of this action is changed from this Court to Supreme Court, County of Westchester, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of Supreme Court, County of Westchester upon service of a copy of this order with notice of entry and payment of appropriate fees, if any.

This constitutes the Decision and Order of the Court.

Dated: New York, New York
June 12, 2007

FILED
JUN 13 2007
COUNTY CLERK'S OFFICE
NEW YORK

ENTER


Hon. Eileen Bransten