

Alenky v Mendelsohn
2007 NY Slip Op 31734(U)
June 11, 2007
Supreme Court, New York County
Docket Number: 0114256/2006
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: **HON. EILEEN BRANSTEN**
Justice

PART 6

Index Number : 114256/2006

ALENKY, DEVIN

vs

MENDELSON, M.D., LINDA JOY

Sequence Number : 001

CHANGE VENUE 4

INDEX NO. 114256/06

MOTION DATE 4-10-07

MOTION SEQ. NO. 01

MOTION CAL. NO. 07

this motion to/for change venue

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1
2,3
4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUN 20 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6-11-07

Eileen Bransten
HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

-----X
DEVIN ALENKY, as the Administratrix of the Estate of
NEIL ALENKY and DEVIN ALENKY individually,

Plaintiffs,

-against-

Index No.: 114256/06
Motion Date: 4-10-07
Motion Seq. No.: 01
Motion Cal. No.: 01

LINDA JOY MENDELSON, M.D., THE MEDICINE
SHOPPE PHARMACY, and LISA A. BAUMANDER,

Defendants.

-----X
PRESENT: EILEEN BRANSTEN, J.

Pursuant to CPLR 510(3) and 511(a), defendant Linda Joy Mendelsohn, M.D. (“Dr. Mendelsohn”) moves for an Order transferring the venue of this action from New York County to Sullivan County on the grounds that the convenience of non-party material witnesses and the ends of justice will be served. Plaintiff Devin Alenky, as the Administratrix of the Estate of Neil Alenky, and Devin Alenky Individually (“Plaintiff”) oppose the motion as do defendants The Medicine Shoppe Pharmacy and Lisa A. Baumander.

Background

On or about October 4, 2006, Plaintiff commenced this wrongful death and medical malpractice action. Plaintiff alleges that between 1999 and November 18, 2004, Dr. Mendelsohn treated decedent Neil Alenky (“Mr. Alenky”) at her Sullivan County office and negligently over-prescribed pain medication resulting in addiction and ultimately death from

a drug overdose. Affirmation in Support (“Supp.”), at 2. Plaintiff also sued The Medicine Shoppe, a pharmacy with a franchise in Sullivan County, and Lisa A. Baumander, a registered pharmacist who worked at that pharmacy (collectively “the Pharmacy Defendants”), maintaining that they negligently dispensed the medication.

Dr. Mendelsohn now moves for a change of venue from this county to Sullivan County. She contends that “the material non-party witnesses will be inconvenienced if venue is retained in New York County.” Supp., at 2. Specifically, Dr. Mendelsohn refers to two witnesses: Thomas E. Warren (“Coroner Warren”), Coroner of Sullivan County who prepared a report related to Mr. Alenky’s death, and Wing Cheong Chau, M.D., F.C.A.P. (“Dr. Chau”), a Sullivan County pathologist who performed the autopsy.

In support of the motion, Dr. Mendelsohn submits affidavits from the two non-party witnesses. Coroner Warren swears:

“I am the Coroner of Sullivan County, in the State of New York. I requested Dr. Wing Cheong Chau to perform the autopsy on the decedent, Neil Alenky. I generated a Coroner’s inquest in connection with the investigation of the death of the decedent * * *. I understand that I will be called to testify at the trial of this action. I would be greatly inconvenienced were this action to remain in New York County because my employment as the Coroner of Sullivan County involves numerous duties in Sullivan County, and having to travel to and from New York County would entail at least a four (4) hour commute during each day of my testimony that will cause me to miss substantial time from work. A change of venue to Sullivan County would allow me to fulfill my duties while losing a minimal amount of time from work.”

Supp., Ex. F.

Dr. Chau similarly affirms:

“I conducted the autopsy of decedent, Neil Alenky on November 19, 2004 and generated an autopsy report of my findings * * * . I understand that I will be called to testify at trial of this action. I would be greatly inconvenienced were this action to remain in New York County because my employment as a pathologist is based in Sullivan County, and having to travel to and from New York County would entail a commute of at least four (4) hours during each day of my testimony, which would cause me to miss a substantial time from work. A change of venue to Sullivan County would allow me to fulfill my duties while losing a minimal amount of time from work.”

Supp., Ex. G.

Dr. Mendelsohn points out that the testimony and findings of these two witnesses who serve as public officers in Sullivan County will be material or necessary to the case because they concluded that Mr. Alenky died from a drug overdose and Plaintiff is alleging that Dr. Mendelsohn over-prescribed medication. Supp., at 4. Dr. Mendelsohn states that the conclusions of these witnesses regarding the manner of death go to the heart of the plaintiff's case and to the heart of Dr. Mendelsohn's defense. Supp., at 4. According to Dr. Mendelsohn, moreover, direct and cross examination of these witnesses “will take several hours if not days to complete.” Supp., at 4.

Dr. Mendelsohn further anticipates that other non-party witnesses will be inconvenienced by a New-York-County venue as well. Dr. Mendelsohn treated Mr. Alenky at the Catskill Regional Medical Center on several occasions; therefore, it is conceivable that

its “employees, medical staff and physicians” could be called to testify. Supp., at 5. Dr. Mendelsohn sets forth that members of her staff “will likely” be called to testify as non-party witnesses as will “employees of co-defendants, The Medicine Shoppe Pharmacy, and Lisa Baumander, whose offices are also located in Sullivan County.” *Id.*

Dr. Mendelsohn urges that the only connection between this action and New York County is Plaintiff’s residence. Supp., at 5. By contrast, the majority of non-party witnesses reside and work in Sullivan County, where all of the material events related to the case arose. Dr. Mendelsohn further asserts that the inconvenience to Plaintiff, a former Sullivan County resident who is the administratrix of Mr. Alenky’s estate, should not weigh heavily since she is a party to the action and CPLR 510(3) focuses on the convenience of non-parties. *Id.* Finally, Dr. Mendelsohn points out that Sullivan County courts are less burdened than the courts in New York County.

In opposition, Plaintiff submits an affidavit attesting to her present New York County residence and her residence herein at the commencement of the action as well. Affirmation in Opposition on behalf of Plaintiff (“Plaintiff Opp.”), Ex. 2. Thus, she argues, venue is unquestionably proper in New York County. Plaintiff charges that this motion is untimely and procedurally defective since a proper demand for a change of venue was not made. Plaintiff Opp., at ¶¶ 8-11.

Plaintiff further contends that Dr. Mendelsohn's motion is "a thinly veiled apparent attempt at forum (venue) shopping." Plaintiff Opp., at ¶ 12. Plaintiff maintains that her convenience must be weighed as well, and that defendant The Medicine Shoppe Pharmacy has a location in New York County. *Id.*, at ¶ 15. She also submits that the convenience of her likely expert witness, who practices medicine in the Bronx and Manhattan and lives in Nassau County, must additionally be considered. Plaintiff's Opp., at ¶ 24.

Plaintiff also submits that Coroner Warren and Dr. Chau do not necessarily have to be inconvenienced since their records will be admissible at trial if accompanied by an appropriate affidavit and transcripts from their depositions could be introduced into evidence, thereby eliminating any need to travel to New York County. Plaintiff Opp., at ¶ 19. Plaintiff emphasizes that with more than 40 justices in New York County (compared to only four in Sullivan County), this venue is well equipped to handle this one additional case. Plaintiff Opp., at ¶ 16.

The Pharmacy Defendants also oppose a transfer. They assert that it is too early to tell who all the witnesses at trial will be and maintain that it would be improper "to grant a change of venue at this early stage in the proceedings, based on the alleged 'inconvenience' of two individuals who may not even have to appear at trial." Affirmation in Opposition on behalf of the Pharmacy Defendants ("Pharmacy Opp."), at ¶ 8. The Pharmacy Defendants reiterate that reports generated by Coroner Warren and Dr. Chau will undoubtedly be

“material and necessary to the plaintiff’s case.” *Id.*, at ¶ 11. “Having introduced the reports,” the Pharmacy Defendants emphasize, “any testimony provided * * * would be redundant and unnecessary. It is highly doubtful that either would have any personal knowledge not contained within the reports, therefore rendering their testimony superfluous.” *Id.* They further assert that Dr. Mendelsohn’s concern for Coroner Wallace and Dr. Chau is simply a disguise of her own interest in having the case venued in her home county. Pharmacy Opp., at ¶ 12.

On reply, Dr. Mendelsohn insists that regardless of Plaintiff’s decision whether or not to call these witnesses, since “the content and conclusions of the records and reports generated by Dr. Chau and Coroner Warren go to the heart of [Plaintiff’s] claim on liability, the movant fully intends to call both of them at trial and cross-examine them about their conclusion that the decedent expired from a drug overdose.” Reply Affirmation, at 5 (emphasis added).

Because Dr. Mendelsohn has established that the “convenience of the material witnesses and the ends of justice” would be promoted by a change of venue from New York County to Sullivan County, *see*, CPLR 510(3), her motion is granted.

Analysis

CPLR 503(a) clearly states that the venue of an action is proper “and the place of trial shall be in the county in which one of the parties resided when it was commenced.” Thus, even if only one party resided in New York County at the inception of the action, venue is proper therein. Here, the venue that Plaintiff selected was undoubtedly proper. It is undisputed that she resided in New York County when the action was commenced.

Nonetheless, Dr. Mendelsohn’s motion requires this Court to consider whether the “convenience of the material witnesses and the ends of justice” would be promoted by a change of venue from New York County to Sullivan County. *See*, CPLR 510(3). The Court has discretion over such a determination; however, the movant’s “submissions must be ‘legally sufficient to support an exercise of that discretion.’” *See, Leopold v. Goldstein*, 283 A.D.2d 319, 320 (1st Dept. 2001) (citation omitted); *see also, T.D.M. v. Pipala*, 223 A.D.2d 419, 419 (1st Dept. 1996).

Appellate Division, First Department case law is clear. The movant--the party on whom the burden rests--must provide a “detailed justification” for the transfer by establishing:

“(1) the identity of the proposed witnesses, (2) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced, (3) that the witnesses have been contacted and are available and willing to testify for the movant, (4) the nature of the anticipated testimony, and (5) the

manner in which the anticipated testimony is material to the issues raised in the case.”

Rodriguez-Lebron v. Sunoco, Inc., 18 A.D.3d 275 (1st Dept. 2005); *see also*, *Gissen v. Boy Scouts of America*, 26 A.D.3d 289, 290 (1st Dept. 2006); *Cardona v. Aggressive Heating, Inc.*, 180 A.D.2d 572, 572 (1st Dept. 1992).

Here, Dr. Mendelsohn has met her burden. She has identified two non-party witness that she intends to call: Coroner Wallace and Dr. Chau. Both non-party witnesses, who perform public-service jobs, have attested to great inconvenience in terms of the trip to court and missing work, which militates in favor of a venue transfer. *See*, *Hoogland v. Transport Expressway, Inc.*, 24 A.D.3d 191, 192 (1st Dept. 2005) (change of venue warranted to accommodate non-party witnesses who would be inconvenienced by having to take a day off from their public-service jobs); *Kennedy v. C.F. Galleria at White Plains, L.P.*, 2 A.D.3d 222, 223 (1st Dept. 2003) (venue should have been changed based on inconvenience to police officers who would have to be absent from work for a full day if venue remained unchanged since the “convenience of public employees * * * should be given more than ordinary consideration”).

Both witnesses, moreover, have been contacted and understand that their testimony will be required. Dr. Mendelsohn has further established that both witnesses have information material and necessary to the defense of the case since they were involved in the

autopsy and inquest into Mr. Alenky's death. These non-party witnesses will offer testimony about the official cause of Mr. Alenky's death and the investigation surrounding its circumstances.

Dr. Mendelsohn's showing was 'sufficient to require plaintiff [and the Pharmacy Defendants] to come forward with countervailing conveniences justifying retention in a county other than where the cause of action arose.' See, *Stonestreet v. General Motors Corp.*, 201 A.D.2d 350, 350 (1st Dept. 1994). Significantly, "the convenience of the parties * * * carries little if any weight." See, *Said v. Strong Mem. Hosp.*, 255 A.D.2d 953, 954 (4th Dept. 1998); see also, *Gissen v. Boy Scouts of America*, 26 A.D.3d 289, 291 (1st Dept. 2006); *Katz v. Goodyear Tire & Rubber Co.*, 116 A.D.2d 506, 507 (1st Dept. 1986) (convenience of the parties is irrelevant). "In addition, the convenience of expert witnesses is not ordinarily to be considered." *Katz v. Goodyear Tire & Rubber Co.*, 116 A.D.2d, at 507.

Here, neither Plaintiff nor the Pharmacy Defendants have come forward with any liability witnesses who would be inconvenienced if this case were transferred to Sullivan County. The residence of Plaintiff, the administratrix of decedent's estate, is not a sufficient basis for retention of venue in New York County in light of the inconvenience to the only named non-party fact witnesses expected to testify thus far and the fact that all of the events that are raised in this case took place in Sullivan County. Cf., *Lloyd v. National Propane Corp.*, 271 A.D.2d 202, 203 (1st Dept. 2000) (transfer to Suffolk County appropriate because

the “fire occurred in Suffolk County, all of the liability witnesses either work or live in Suffolk County, several witnesses have expressed inconvenience in having to testify in New York County, and the only verified basis for plaintiff’s choice of venue in New York County is [defendant’s] designation of its agents there for service of process”).

Finally, Dr. Mendelsohn’s motion is not procedurally defective. A motion for change of place of trial to promote the convenience of material witnesses and the ends of justice--unlike one based on improper venue, which requires compliance with a specified demand procedure--need only “be made within a reasonable time after commencement of the action.” CPLR 511(a). This motion was made only a few months after the action was commenced.

In the end, in response to Dr. Mendelsohn’s showing that two non-party witnesses would be inconvenienced by a trial in New York County, Plaintiff and the Pharmacy Defendants failed to come forward with even a single fact witness who potentially would be inconvenienced by transfer of this case to Sullivan County. Thus, Dr. Mendelsohn’s motion is granted and the action is transferred to Sullivan County.

Accordingly it is

ORDERED that Dr. Mendelsohn’s motion to change the venue of this matter from New York County to Sullivan County pursuant to CPLR 510(3) and 511 is granted and the venue of this action is changed from this Court to the Supreme Court, Sullivan County, and the Clerk of this Court is directed to transfer the papers on file in this action to the Clerk of

the Supreme Court, Sullivan County 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 11, 2007

ENTER



Hon. Eileen Bransten

FILED
JUN 20 2007
COUNTY CLERK'S OFFICE
NEW YORK