SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

JORDAN BERNSTEIN, A MINOR UNDER THE AGE OF 18 YEARS OF AGE BY HIS MOTHER AND NATURAL GUARDIAN, MALKA BERNSTEIN, AND MALKA BERNSTEIN, INDIVIDUALLY,

Plaintiff(s),

-against-

RANDY WYSOKI, M.D., "JANE DOE" R.N. (TRUE NAME BEING FICTITIOUS AND UNKNOWN AT THIS TIME), DINA FARRELL, M.D., MICHAEL FARRELL, M.D., GREGORY SCAGNELLI, M.D., PATRICIA GRANT, R.N., WILLIAM KAZALSKI, R.N., CAMP ISLAND LAKE AND WILSON MEMORIAL REGIONAL MEDICAL CENTER,

Defendant(s).

ORIGINAL RETURN DATE:02/18/08
SUBMISSION DATE: 04/24/08
INDEX No.: 20686/07

MOTION SEQUENCE #1,2,3,4

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Motion by defendant Sports and Arts Center at Island Lake, s/h/a Camp Island Lake ("Camp"), for judgment dismissing the complaint against it, pursuant to CPLR 3211(a)(1) and (2) and 501, is denied.

Cross-motion by defendants Patricia Grant, R.N., William Kazalski, R.N., and United Health Services Hospitals, Inc, s/h/a Wilson Memorial Regional Medical Center ("the Hospital"), for an order transferring the venue of this action to Broome County, State of New York, pursuant to CPLR 510 and 511(a), is denied.

Cross-motion by defendants Randee Wysoki, M.D., Dina Farrell, M.D., Michael Farrell, M.D., and Gregory Scagnelli, M.D., for an order dismissing this action, pursuant to CPLR 3211(a)(1) and (2) and 501, on the grounds that the forum selection clause in the contract between plaintiffs and the Camp covers all parties herein, is denied.

Motion by plaintiffs for an order, pursuant to CPLR 3025(b), granting them leave to serve the proposed amended summons and complaint to add Jill Tschinkel, R.N., a nurse at the Camp, and Julie Higgins, R.P.A. as party defendants and amending the caption accordingly is granted.

According to plaintiffs, 13-year old Jordan Bernstein ("Jordan") was a camper at the Camp in Starrucca, Pennsylvania, in August 2007. He sought treatment for lower abdominal pain on August 8, 2007, and was confined to the Hospital from August 8, 2007, through August 10, 2007. Jordan's injuries include acute testicular torsion, resulting in loss of function of testicle and requiring implantation of prosthesis to replace the testicle. Plaintiffs commenced this action in November 2007 alleging that defendants negligently failed to timely recognize and properly treat Jordan's condition resulting in severe and permanent injuries.

The Camp's 2007 Enrollment Agreement ("the Agreement"), which was signed by plaintiff Malka Bernstein, Jordan's mother, contains the following provision:

> The venue of any dispute that may arise out of this agreement or otherwise between the parties to which the camp or its agent is a party shall be either the local District Justice Court or the Court of Common Pleas, Wayne County, Pennsylvania.

Based on this provision, the Camp seeks judgment dismissing the complaint on the grounds of documentary evidence (CPLR 3211(a)(1)) and lack of subject matter jurisdiction (CPLR 3211(a)(2)), because this contractual provision fixes venue (CPLR 501) "of any dispute that arises out of this agreement or otherwise."

In its answer and subsequent amended answer the Camp alleges as its eighteenth and nineteenth affirmative defenses, respectively, improper venue and inconvenient forum. As the Camp's objection to venue is expressly set forth in its answer, the dismissal motion by the Camp is properly before the Court (see generally *FGII, Inc. v Saks Inc.*, 46 AD3d 305 [1st Dept. 2007]).

On a motion to dismiss pursuant to CPLR 3211, the facts as alleged must be accepted as true, the pleader must be accorded the benefit of every favorable influence, and the court must determine only whether the facts as alleged fit within any cognizable theory (*Arnav Industries Inc. Retirement Trust v Brown Raysman, Millstein, Felder & Steiner, LLP,* 96 NY2d 300, 303 [2001]). Where documentary evidence is presented, dismissal is warranted if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*Id.*; *Leon v Martinez*, 84 NY2d 83, 88 [1994]). An agreement containing a forum selection

clause is properly considered pursuant to CPLR 3211(a)(1) (*Boss v American Express Financial Advisors, Inc.*, 6 NY3d 242 [2006]; *Devos Ltd. v RX Recalls, Inc.*, 12 Misc 3d 1186(A) [Sup. Ct., Suffolk Cty, 2005]).

At the outset the court notes that subject matter jurisdiction is a matter of judicial power; that is whether the court has the power, conferred by the Constitution or statute, to entertain the case before it (*Matter of Fry v Village of Tarrytown*, 89 NY2d 714, 718 [1997]). Subject matter jurisdiction may not be conferred as a matter of consent by the parties (*In re Metropolitan Transportation Authority*, 32 AD3d 943, 945 [2d Dept. 2006]; *Morrison v Budget Rent A Car Systems Inc.*, 230 AD2d 253, 260 [2d Dept. 1997]), and it may not be waived (see *White v People*,, 41 AD3d 860 [2d Dept.], lv app den 9 NY3d 811 [2007]; *Feustel v Feustel*, 242 AD2d 628 [2d Dept. 1997]). As the Supreme Court is a court of original, unlimited and unqualified jurisdiction (NYConstitution, Art VI, §7), this Court has subject matter jurisdiction of the parties' dispute. Dismissal pursuant to CPLR 3211(a)(2) is denied.

The basis of the claim for dismissal pursuant to CPLR 3211(a)(1) is the forum selection clause in the Agreement. Forum selection clauses are enforced because they provide certainty and predictability in the resolution of disputes (*Boss* at 247). Plaintiffs' attempt to distinguish this case from *LSPA* and *Fleet* because the word "venue" is used rather than "jurisdiction" is unconvincing. There are "no magic words . . . that must appear in a contract to create an effective description of an exclusive forum. Any language that reasonably conveys the parties' intention to select an exclusive forum will do" (*Babcock & Wilcox Company v Control Components, Inc.*, 161 Misc 2d 636, 643 [Sup Ct., NY Cty, 1993] quoting *Water Energizers Ltd. v Water Energizers Inc.*, 788 F. Supp 208, 212 [SDNY 1992]). Use of the word "venue" is adequate to convey the agreed location for dispute resolution (see *CV Holdings, LLC v Bernard Technologies, Inc.*, 14 AD3d 854 [3d Dept. 2005]), and use of the word "shall" clearly conveys the mandatory nature of the forum selection clause.

Plaintiffs argue that the venue selection refers only to "disputes relating to the fee, tuition and refund issues discussed in that paragraph" (Bern affirmation, ¶ 12). This argument, too, is unavailing. The words "any dispute that may arise out of this agreement or otherwise" must be given their plain and ordinary meaning (see *Greenfield v Phillies Records, Inc.*, 98 NY2d 562, 569 [2002]; *McGuckin v Snapple Distributors, Inc.*, 41 AD3d 795 [2d Dept. 2007]), which is in no way limited to financial matters.

The Court must also consider whether the forum selection clause is binding on the infant Jordan Bernstein. A release executed by a parent is not binding on a minor child; a parent cannot waive an infant's right to damages for personal injury (*Alexander v Kendall Central School District*, 221 AD2d 898 [4th Dept. 1995]; *Castro v Boulevard Hosp.*, 106 AD2d 539 [2d Dept. 1984]; *Santangelo v City of New York*, 66 AD2d 880, 881 [2d Dept. 1978]; *Kotary v Spencer Speedway, Inc.*, 47 AD2d 127 [4th Dept. 1975]; *Gordon v Agaronian*, 10 Misc 2d 650 [Sup Ct, Kings Cty, 1957]). The logical extension of this principle is that a parent cannot bind a minor child to a forum selection clause. The court finds, therefore, that the forum selection clause is not binding on the infant plaintiff.

A contractual forum selection clause is *prima facie* valid unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be so gravely difficult that the challenging party would be deprived of its day in court (*Stravalle v Land Cargo Inc.*, 39 AD3d 735, 736 [2d Dept. 2007]; *LSPA Enterprise Inc. v Jani-King of New York, Inc.*, 31 AD3d 394 [2d Dept. 2006]; *Fleet Capital Leasing/Global Vendor Finance v Angiuli Motors Inc.*, 15 AD3d 535, 536 [2d Dept. 2005]).

The court finds that if it were to uphold the enforceability of the forum selection clause against the parent, Malka Bernstein, the result would be that she would be deprived of her day in court as the action would still continue in New York on behalf of the infant plaintiff. Such result would be unreasonable and unjust.

Accordingly, the motion to dismiss the complaint pursuant to CPLR 3211(a)(1), on the grounds of the forum selection clause, is denied. In view of this determination, the Court must proceed to consider the alternative grounds for dismissal of the claims: *forum non conveniens*.

Forum non conveniens is a common-law doctrine, also articulated in CPLR 327, which permits a Court to stay or dismiss an action where it is determined that the action, although jurisdictionally sound, would be better adjudicated elsewhere. On a motion to dismiss on the grounds of *forum non conveniens*, the burden is on a defendant challenging the forum to demonstrate relevant private or public interest factors which militate against accepting the litigation (*Islamic Republic v Pahlavi*, 62 NY2d 474, 479 [1984], cert. den. 469 U.S. 1108 [1985]; *Smolik v Turner Construction Co.*, 48 AD3d 452 [2d Dept. 2008]; *Kefalas v Kontogiannis*, 44 AD3d 624, 625 [2d Dept. 2007]). Among the factors the court must weigh are the residency of the parties, the potential hardship to proposed witnesses, the availability of an alternative forum, the situs of the actionable events, and the burden which will be imposed upon the New York courts (*Islamic Republic*; *Smolik*; *Kefalas*; *Stravalle v Land Cargo Inc.*, 39 AD3d at 736).

Here, the factors that favor dismissal are the residency of the defendant Camp and the fact that Pennsylvania is the original situs of plaintiff Jordan Bernstein's condition which triggered the need for treatment. No fact witnesses are identified by the Camp, and therefore this factor does not help the defendant Camp. Nor does the availability of the court system in Pennsylvania help the Camp, because there has been no showing that the Hospital or other individual defendants are subject to, or would consent to, jurisdiction in Pennsylvania. Nor has there been any showing of undue burden on this Court.

The factors favoring retention are the residency of the infant plaintiff, the alleged inconvenience to the infant plaintiff's treating physicians (see Bern affirmation in opposition, ¶ 26), and the availability of the New York forum for litigation of Jordan's claims against the Hospital and most of the individual defendants. Although plaintiffs failed to identify their non-party witnesses who allegedly reside in New York, their attorney does list 5 such witnesses in

opposition to the cross-motion by the Hospital and its nurses for a transfer of venue (see Coppinger affirmation, ¶ 19). In addition, to the extent that plaintiffs allege that negligence or malpractice occurred at the Hospital, New York may be an additional situs of Jordan's injuries.

Overall, the Court finds that the circumstances of this case are not so compelling as to justify rejection of Jordan's choice of forum. Considerations of justice, fairness and convenience (*Silver v Great Am. Ins. Co.*, 29 NY2d 356, 361 [1972]) support denial of the request for dismissal on the basis of *forum non conveniens* on this record.

For the record, plaintiffs' reliance on Business Corporation Law ("BCL") 1314 is misplaced. BCL 1314(a), which authorizes an action against a foreign corporation by a resident of this state, is permissive. BCL 1314(b), which authorizes an action in New York against a foreign corporation "by another foreign corporation of any type or kind or by a non-resident," is not applicable. In addition, the Camp's delay in bringing the instant motion is not so inordinate as to constitute a waiver (*Hudson's Bay New York, Inc. v United States Fidelity & Guaranty Co.*, 246 AD2d 389 [1st Dept. 1998]; cf. *Jones v Eon Labs Inc.*, 43 AD3d 711 [1st Dept. 2007]).

Under all of the circumstances of this case, and the record presented, the Court hereby denies dismissal of the complaint by Jordan against the Camp on the grounds of *forum non conveniens*.

Based on the foregoing, only the causes of action by Malka Bernstein against the Camp must be dismissed on the basis of the forum selection clause. The remainder of the complaint is severed and continued (see generally *Imperial Imports Co., Inc. v Hugo Neu & Sons, Inc.*, 161 AD2d 411 [1st Dept. 1990]).

The four defendant physicians also seek dismissal of this action against them on the same grounds as the Camp. Dr. Wysoki was the attending physician at the Camp when Jordan Bernstein sought treatment. Apparently Dr. Dina Farrell, Dr. Michael Farrell and Dr. Gregory Scagnelli are physicians who treated Jordan at the Hospital in Broome County, New York. The physicians argue that the claims alleged against each of them in the complaint are covered by the terms and conditions of the Agreement between Malka Bernstein and the Camp. They therefore insist that the forum selection clause extends to cover all claims against them and precludes commencement of this action against them in this county.

Non-parties to an agreement containing a forum selection clause may be entitled to enforce the forum selection clause under three sets of circumstances: (1) where the non-party is a third-party beneficiary of the contract; (2) where the non-party is part of a "global transaction;" and (3) where the relationship between the non-party and the signatory is "sufficiently close" so that the enforcement of the clause is foreseeable by virtue of the relationship between them (*Freeford Ltd. v Pendleton,* __AD3d__, 2008 WL 962626 [1st Dept. 2008]; *ComJet Aviation Management LLC v Aviation Investors Holdings Ltd*, 303 AD2d 272 [1st Dept. 2003]). As the defendant physicians were not third-party beneficiaries of the Camp's Agreement and this case does not involve a "global transaction," the only possibility for extension of the forum

selection protection is the third option of establishing a "sufficiently close relationship" between the physicians and the Camp.

The cases where a Court has found the requisite "close relationship" between a non-signatory and a signatory are where the two are parent and subsidiary corporations and there is a factual predicate for the foreseeable enforcement by the non-signatory (*Dogmoch International Corp v Dresdner Bank AG*, 304 AD2d 396 [1st Dept. 2003]) and where the non-signatory is the chief executive officer of the signatory corporation and the liability of both is predicated on the same alleged acts (*Dovin Construction , Inc. v C. Raimondo & Sons Construction Co., Inc.*, 29 AD3d 364 [1st Dept. 2006]). Neither of these fact patterns is presented here, and defendant physicians provide no other authority for their attempt to piggyback on the forum selection clause.

The fact that Dr. Wysoki was the physician at the Camp at the time that Jordan Bernstein sought treatment does not, standing alone, entitle Dr. Wysoki to the protections of the forum selection clause in the Camp's Agreement with Malka Bernstein. Furthermore, there is no arguable basis for the reliance of the other three physicians on the forum selection clause in the Camp's Agreement. Consequently, the motion by the four physicians for dismissal of the complaint against them on the basis of the forum selection clause must be denied.

Moving on to the motion for a change of venue, the statutory ground cited for the requested change of venue is "the convenience of material witnesses and the ends of justice will be promoted by the change" (CPLR 510(3)). A motion pursuant to CPLR 510(3) is addressed to the sound discretion of the judge (*Walsh v Mystic Tank Lines Corp.*, __ AD3d__, 2008 WL 2130573 [2d Dept. 2008]; *O'Brien v Vassar Brothers Hosp.*, 207 AD2d 169 [2d Dept. 1995]). However, the convenience of the parties and their experts is not relevant for the purposes of this motion (*Frankel v Stavsky*, 40 AD3d 918 [2d Dept. 2007]; *O'Brien*; *Mei Ying Wu v Waldbaum, Inc.*, 284 AD2d 434 [2d Dept. 2001]; *Cumberbatch v Gatehouse Motel Restaurant*, 265 AD2d 370 [2d Dept. 1999]). Furthermore, as to relevant non-party witnesses, the movant must set forth: (1) the names, addresses and occupations of the prospective witnesses; (2) the facts to which the witnesses will testify at trial, so that the court may judge whether the proposed evidence of the witness is necessary and material; (3) a statement that the witnesses are willing to testify; and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed (*Walsh*; *O'Brien* at 172).

Here, the Hospital, Nurse Grant, and Nurse Kazalski move to change the venue of this action from Nassau County to Broome County, New York, due to the alleged inconvenience of a trial in Nassau County for five party witnesses and one non-party witness (see Ingraham affidavit, ¶ 8). Yet the moving defendants failed to submit evidence to establish the aforementioned necessary criteria as to any of the witnesses; and, accordingly, the motion for change of venue must be denied (*25/27 Corp. v Mormile,* 43 AD3d 1154 [2d Dept. 2007]; *Shindler v Warf*, 24 AD3d 429 [2d Dept. 2005]; *Cumberbatch*; *Fernandes v Lawrence*, 290 AD2d 412 [2d Dept. 2002]; *O'Brien*). Indeed, even if the moving defendants had submitted the required information, the inconvenience to the five party witnesses is not relevant. The alleged inconvenience to the sole proposed non-party witness does not shift the balance in favor of the

movants. Therefore, the motion by the nurses and the Hospital for a discretionary change of venue must be denied.

Finally, plaintiffs seek leave to amend their complaint to add Jill Tschinkel, R.N., the nurse at the Camp, and Julie Higgins, R.P.A. as party defendants in this action and to amend the caption accordingly. A motion to amend the summons and complaint to add a new party is properly brought pursuant to CPLR 1003 and 3025(b). "Leave to amend shall be freely granted upon such terms as may be just," such motions are liberally granted absent prejudice or surprise, and the court will not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear (*Long Island Title Agency, Inc. v Frisa*, 45 AD3d 649 [2d Dept. 2007]; *Roberts v Borg*, 35 AD3d 617 [2d Dept. 2006]). Parties may be added at any stage of an action (see *Public Administrator of Kings County v McBride*, 15 AD3d 558, 559 [2d Dept. 2005] and *Yadegar v International Food Market*, 306 AD2d 526 [2d Dept. 2003]) and CPLR 1003 is to be liberally construed (*Gross v BFH Co., Inc.*, 151 AD2d 452 [2d Dept. 1989]).

Plaintiffs have explained that they recently received the information regarding Ms. Tschinkel and, therefore, seek now to amend the complaint to replace Jane Doe, R.N., with Jill Tschinkel, R.N. There has been no prejudice or surprise alleged by the other defendants, and at this early stage of this litigation the court can conceive of none. Under these circumstances, plaintiffs' motion for leave to serve the proposed amended summons and complaint is granted. The court, *sua sponte*, extends plaintiffs' time to properly serve defendants, Jill Tschinkel, R.N. and Julie Higgins, R.P.A. , "in the interests of justice" (CPLR 306-b) for a period of sixty (60) days from the date of this order.

Accordingly, the caption of this action is amended as follows:

"JORDAN BERNSTEIN, a minor under the age of
18 years of age by his Mother and Natural Guardian,
MALKA BERNSTEIN, AND MALKA BERNSTEIN,
Individually,

Plaintiffs,

-against-

RANDY WYSOKI, M.D., JILL TSCHINKEL, R.N.,
DINA FARRELL, M.D., MICHAEL FARRELL,
M.D., GREGORY SCAGNELLI, M.D., PATRICIA GRANT,
R.N., WILLIAM KAZALSKI, R.N., JULIE HIGGINS,
R.P.A., CAMP ISLAND LAKE and WILSON MEMORIAL
REGIONAL MEDICAL CENTER,

Defendants."

To insure the expeditious completion of disclosure in this action, a Preliminary Conference shall be held.

Counsel are directed to appear on July 8, 2008 at 9:30 A.M. in the Preliminary Conference area, lower level of this courthouse, to obtain and fill out a Preliminary Conference Order.

This decision constitutes the order of the court.

6-10-08
Dated

HON THOMAS P. PHELAN
J.S.C.

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