

Berger v Shen

2009 NY Slip Op 31671(U)

July 23, 2009

Supreme Court, New York County

Docket Number: 100876/09

Judge: Alice Schlesinger

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PRESENT: ALICE SCHLESINGER

JA PART 16
PART

Index Number : 100876/2009

BERGER, RENA

VS.

SHEN, M.D., KATHERINE JOY

SEQUENCE NUMBER : 001

CHANGE VENUE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.**

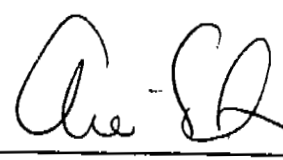
FILED

JUL 28 2009

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: JUL 23 2009



ALICE SCHLESINGER
NON-FINAL DISPOSITION

J.S.C.

Check one: FINAL DISPOSITION

Check If appropriate: DO NOT POST

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

-----X
RENA BERGER and RUSSELL HART,

Plaintiffs,

-against-

KATHERINE JOY SHEN, M.D., AUDREY LYNN
HALPERN, M.D., and THE WESTCHESTER
MEDICAL GROUP, P.C.,

Defendants.

Index No. 100876/09
Motion Seq. No. 001

FILED

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COUNTY CLERK'S OFFICE
NEW YORK

SCHLESINGER, J.:

Plaintiffs Rena Berger and Russell Hart have commenced this medical malpractice action alleging that defendants Katherine Joy Shen, M.D., Audrey Lynn Halpern, M.D., and The Westchester Medical Group, P.C. ("Westchester") have injured plaintiff Berger through their care and treatment. Defendant Halpern has moved and co-defendants Shen and Westchester have cross-moved to change venue from New York County to Westchester County pursuant to CPLR §510, subd. 3. Plaintiffs have opposed the motion, arguing that the defendants have failed to satisfy their burden of showing that material non-party witnesses will be inconvenienced by venue in New York County.

Procedural History

On January 22, 2009, plaintiffs commenced this action and designated New York County as the place of trial pursuant to CPLR §503 based on the residence of one or more of the defendants in New York County. Along with her answer, Dr. Halpern served a CPLR §511 demand to change venue to Westchester County on the ground that the county designated by the plaintiff was not a proper county. Plaintiff responded to the CPLR §511 demand with an attorney affirmation asserting that New York County

was the proper county based on Dr. Halpern's residence on West 23rd Street in Manhattan.

Dr. Halpern thereafter moved and Dr. Shen and Westchester cross-moved for an order to change venue from New York County to Westchester County pursuant to CPLR §510 subd. 3. CPLR §510, subd. 3, allows a change of venue on motion where "the convenience of material witnesses and the ends of justice will be promoted by the change." By choosing not to move under subdivision 1, defendants apparently acknowledged that venue had been properly set in the first instance pursuant to section 503 based on Dr. Halpern's New York residence. Therefore, the issue before the Court is whether the moving parties have satisfied their burden of proving that a change of venue to Westchester County is necessary for the convenience of material witnesses and to promote the ends of justice.

Background Facts

On February 7, 2007 Dr. Shen, an otolaryngologist employed by Westchester, performed a functional endoscopic sinus surgery on plaintiff Rena Berger. After the surgery, plaintiff consulted Dr. Halpern, a neurologist then employed by Westchester, because she was allegedly suffering from symptoms related to anosmia and loss of taste. Plaintiff maintains the surgery performed by Dr. Shen caused injury to the base of her skull and that Dr. Halpern failed to properly diagnose and treat the injury, which purportedly led to an intracranial mucocele and encephalocele. On or about December 19, 2007, plaintiff, still suffering from those symptoms, consulted New York County physicians Erik C. Parker, MD, Assistant Professor of the Department of Neurosurgery

and Joseph Jacobs, MD, Assistant Professor of the Department of Otolaryngology, both employed at NYU Medical Center. While all of the defendants' care and treatment was rendered in Westchester County, all subsequent medical treatment was provided to plaintiff in New York County.

Discussion

As noted above, plaintiff's designation of New York County as the place of trial was proper because pursuant to CPLR §503 based on Dr. Halpern's residence here. The motion by Dr. Halpern and the cross-motion by Dr. Shen and Westchester to change venue to Westchester County is based on CPLR §510, subd. 3. As such, defendants bears the burden of demonstrating through detailed evidence that the convenience of material witnesses and the ends of justice would be better served by the proposed change. Here, however, defendants have wholly failed to meet that burden.

According to CPLR §510, subd. 3, a party seeking a change of venue must fulfill specific requirements to satisfy the burden of proving that material non-party witnesses would be inconvenienced in the chosen venue. Specifically, the movant must: (1) list the names, addresses and occupations of the witnesses who are expected to be called; (2) disclose the facts to which such witnesses will testify so that the court may determine whether the testimony of the proposed witnesses is "necessary and material;" (3) demonstrate that the witnesses are actually willing to testify; and (4) show that the witnesses would in fact be inconvenienced in the absence of a change of venue.

Hernandez v. Rodriguez, 5 A.D.3d 269 (1st Dep't 2004).

In the instant case, defendants have not satisfied any of these requirements. Here, the only evidence submitted in support of the defendants' motions are affidavits

from Dr. Halpern, Dr. Shen and Dr. Barney Newman in his capacity as the Medical Director of the Westchester Medical Group. All three affidavits simply state that surgery, care and treatment which defendants provided to plaintiff occurred in Westchester County where both defendants were then employed.

However, under CPLR §510, subd. 3, the convenience of the defendants is not dispositive; rather, the issue is whether the convenience of "non-party" material witnesses will be served by the change in venue. *Torres v. Larsen*, 195 A.D.2d 285, 287 (1st Dep't 1993). Indeed in *Clinton v. Griffin*, 176 A.D.2d 501 (1st Dep't 1991), cited by Dr. Halpern, the court based its decision to change venue on the convenience of non-party witnesses. Even if convenience to the defendants were considered, it cannot be said that traveling the short distance from Westchester County to testify in New York would qualify as an inconvenience. See, *Hernandez*, 5 AD2d at 270 (travel from Suffolk county to Bronx county does not give rise to a presumption of inconvenience). Further, in the case at bar, as noted earlier, both of plaintiff's subsequent treating physicians maintain offices in New York County. It is anticipated that plaintiff will call them to testify as to her injuries, and venue here would be preferable to them.

What is more, to establish the inconvenience of material non-party witnesses, "it is necessary at least to contact them." *Carrozzo*, 292 A.D.2d at 279, quoting *MacRobbie v. Olivio*, 200 A.D.2d 273, 274 (1st Dep't 1994). Defendants have not done so. They have failed to provide a single name of a prospective witness, let alone an offer of proof that the witnesses will give necessary and material testimony.

Finally, defendants proffer two arguments that also fail to persuade. Dr. Halpern contends that the general rule is that a transitory action (defined as one brought for the

enforcement of personal rights or obligations) such as this one should be tried in the county in which the cause of action arose. However, the transitory test is no longer controlling; the prevailing rule is that the moving party must satisfy the four elements noted above relating to the convenience of material witnesses. See *Hernandez v. Rodriguez*, 5 A.D.3d 269 (1st Dep't 2004). Furthermore, Dr. Shen and Westchester argue that calendar congestion in New York County supports a change of venue to Westchester County. However, the two calendars are not significantly different, and calendar congestion is not dispositive where, as here, the defendants have wholly failed to meet their burden under the statute to establish inconvenience to material witnesses.

Accordingly, it is hereby

ORDERED that the motion by defendant Dr. Halpern and the cross-motion by defendants Dr. Shen and Westchester Medical to change venue from New York County to Westchester County are denied, and plaintiff's action shall proceed in New York County.

This constitutes the decision and order of the Court.

Dated: July 23, 2009

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FILED
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 COUNTY CLERK'S OFFICE
 NEW YORK

Alice Schlesinger

 J.S.C.
ALICE SCHLESINGER