

<b>Brasier v Cortland Community Reentry Program</b>
2009 NY Slip Op 33468(U)
September 23, 2009
Supreme Court, New York County
Docket Number: 104246/09
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IA PART 16

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ROBERTA BRASIER and C. RANDOLPH HOLLADAY,  
as Co-Guardian of the Person and Property of  
WILLIAM D. WHINERY,

Plaintiff,

-against-

CORTLAND COMMUNITY REENTRY PROGRAM, INC.

Defendant.

-----X  
SCHLESINGER, J.:

**FILED**  
SEP 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Index No. 104246/09  
Motion Seq. No. 001

Defendant Cortland Community Reentry Program, Inc. has moved herein for an order to change venue from New York County to Cortland County on the ground that New York is not a proper county within the meaning of CPLR § 503 and §511. In the alternative, counsel asks that the Court in its discretion change venue to Cortland County pursuant to CPLR § 510(3) for the convenience of material witnesses and to promote the ends of justice. Plaintiff opposes this motion by arguing that the action is properly venued in New York County based on the residence of the co-guardian and that the defendant has failed to provide sufficient justification for a discretionary change of venue for the convenience of witnesses.

The Rules Governing Venue Selection

In New York, the place of trial shall be in the county designated by the plaintiff unless the court orders a change in response to defendant's motion or both parties agree to change venue. CPLR §509. Pursuant to CPLR §510, the court upon motion may change the place of trial of an action where:

- 1. the county designated for that purpose is not a proper county; or
- 2. there is reason to believe that an impartial trial cannot be had in the proper county;

or

3. the convenience of material witnesses and the ends of justice will be promoted by the change.

If a defendant seeks to change venue as of right based on an alleged improper county under CPLR §510(1), the defendant must serve a demand for a change of venue on the plaintiff with or prior to the answer to the complaint. CPLR §511(a). If the plaintiff does not consent to the proposed change within five days of such a demand, the defendant then has fifteen days to move for a change of venue. CPLR §511(b). Defendant in this case has followed the necessary steps and timely filed this motion.

Regarding defendant's alternative request for a discretionary change of venue, the demand requirements do not apply. However, it is not enough for a party to state in conclusory fashion that the convenience of witnesses would be served by a change in venue. Rather, the moving party bears the burden of demonstrating through detailed evidence submitted in affidavit form the following information: (1) the names and addresses of the proposed witnesses; (2) the substance and materiality of their testimony relative to the issues in the case; (3) that the witnesses have been contacted and are willing to testify for the movant; and (4) the manner in which they will be inconvenienced by a trial in the county in which the action was commenced. *Gissen v Boy Scouts of America*, 26 AD3d 289, 290-91 (1<sup>st</sup> Dep't 2006). Only after such a detailed evidentiary showing that material witnesses would in fact be inconvenienced will a discretionary change of venue be granted. *Hernandez v. Rodriguez*, 5 A.D.3d 269 (1<sup>st</sup> Dep't 2004).

#### Defendant has Failed to Prove its Entitlement to a Change of Venue

In the instant case, defendant has not justified a change of venue under either ground. Plaintiff based venue in New York County on the residence here of one of the co-guardians,

C. Randolph Holladay. The second co-guardian Roberta Brasier resides in Washington State and the ward William D. Whinery is presently receiving treatment there.

While defendant correctly notes that the address given for Mr. Holladay is his office, not his residence, the fact remains that the "residence" of a guardian is "the county of his appointment as well as the county in which he actually resides." CPLR §503(b). The co-guardians in this case were appointed in New York County in 1998 by Justice Emily Jane Goodman in a proceeding pending here under Index No. 500220/98. Justice Goodman's November 9, 1998 order of appointment states that the guardianship is "for an indefinite period and until such time as William D. Whinery is removed from the jurisdiction of New York State to the State of Washington, and an application is granted by a court of competent jurisdiction for letters of guardianship." Although Mr. Whinery is presently in Washington receiving treatment, counsel claims the move is temporary, and no papers have been filed to transfer the guardianship to that state.<sup>1</sup> As the guardianship remains in New York County, venue was properly placed here.

Nor has defendant met its burden of establishing that venue should be changed on a discretionary basis for the convenience of witnesses. Defendant has presented an affidavit from George J. Griffith, Jr., the Director of Program Development at Cortland Community Reentry Program. He describes the facility as a post acute brain injury rehabilitation program with a residential and long term care component located in Cortland County, New York, about 220 miles from Manhattan. Mr. Whinery resided there for many years following a brain injury

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<sup>1</sup> Defendant argues that the guardians had no power under Justice Goodman's order to move Mr. Whinery to Washington or to commence this action. As those issues have no bearing on venue, they will not be addressed here but may be raised in an appropriate forum if meritorious.

caused by an assault until he went to Washington this year. The only potential witness he identifies by name is Dr. Polly Cator. However, he does not state where Dr. Cator now resides, whether she was contacted and is willing to testify, and precisely what issues her testimony would address. He only states in general terms that Dr. Cator and others at the facility were involved in Mr. Whinery's care and "will in all likelihood have to travel to New York County for depositions and for the trial of this action, which is expected to last several days. It would be burdensome and expensive for these individuals to take time away from our work and professions to travel to New York county and obtain accommodations for both depositions and the trial." (See Aff. in support of motion at ¶6). These allegations are insufficient when measured against the First Department's rule as stated in *Gissen* and a myriad of other cases, particularly since the claims in this case go far beyond negligence to include fraud, breach of contract and unjust enrichment..

Accordingly, it is hereby

ORDERED that defendant's motion to change venue from New York County to Cortland County is denied and plaintiff's action shall proceed in New York County with a preliminary conference forthwith.

This constitutes the decision and order of the Court.

Dated: September 23, 2009

SEP 23 2009

*Alice Schlesinger*  
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 J.S.C.

**FILED**  
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**ALICE SCHLESINGER**