

O'Brien v Gelbart

2010 NY Slip Op 30309(U)

February 9, 2010

Supreme Court, New York County

Docket Number: 111003/09

Judge: Joan B. Lobis

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

PRESENT: Jean B. Lolis
Justice

PART 6

Index Number : 111003/2009
O'BRIEN, JOHN P.
vs.
GELBERT, D.D.S, MICHAEL P.
SEQUENCE NUMBER : 001
CHANGE VENUE

INDEX NO. _____

MOTION DATE 12/17/09

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

1-11

12-15

16

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

FILED
FEB 16 2010
NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 2/9/10

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
JOHN P. O'BRIEN and JUDITH O'BRIEN,

Plaintiffs,

Index No. 111003/09

-against-

Decision and Order

**MICHAEL P. GELBART, D.D.S., NEIL KESSELMAN,
D.D.S., ROBERT FRIEDMAN, D.M.D., GELBART
AND KESSELMAN, P.C., GELBART AND KESSELMAN,
P.C. D/B/A FAMILY DENTAL GROUP, and FAMILY
DENTAL GROUP,**

Defendants.

-----X
JOAN B. LOBIS, J.S.C.:

Defendants seek an order changing venue based on the individual defendants' and the corporate defendants' residences. Defendants assert that the proper forum is Dutchess County, where they assert the corporate defendants' principal offices are located. For the reasons discussed below, defendants' motion is denied.

Plaintiffs served defendants on or about August 3, 2009. Prior to that date, plaintiffs filed the complaint in New York County, basing venue on their belief that Family Dental Group's (the "Group") principal place of business is in New York County. On or about October 9, 2009, along with the answer, defendants served a demand for a change of venue upon plaintiffs, pursuant to C.P.L.R. Rule 511(b). Plaintiffs responded with an affidavit, dated October 14, 2009, maintaining that the venue is proper because defendants Michael P. Gelbart, D.D.S., Robert Friedman, D.M.D., and Neil Kesselman, D.D.S., have businesses located at 121 East 60th Street, New York, New York, and because the Group has a principal place of business located at 121 East 60th Street, New York, New York. This motion to change venue was

served by mail on October 26, 2009. In their motion, defendants include affidavits from all of the individual defendants, in which they assert that they do not live in New York County; that corporate defendant Gelbart and Kessleman P.C. (the "P.C.") has a principal office in Dutchess County; and that the P.C. does business in New York County under the name "Family Dental Group." As documentary evidence, defendants provide a copy of the certificate of incorporation for the P.C., which confirms that its principal office is in Dutchess County. The Group is unaccounted for in the documentary evidence.

Under C.P.L.R. § 503(a), "the place of trial shall be in the county in which one of the parties resided when it was commenced." A corporation is "deemed a resident of the county in which its principal office is located." C.P.L.R. § 503(c). In order to effectuate a change of venue based on non-residency, the defendant must "serve a written demand that the action be tried in a county he specifies as proper." C.P.L.R. Rule 511(b). If the plaintiff does not consent to the change, the defendant has fifteen (15) days to make a motion to change venue. *Id.* If the fifteenth day falls on a Saturday, Sunday, or holiday, the defendant may make his Rule 511(b) motion on the next business day. N.Y. Gen. Const. Law § 25-a. Pursuant to C.P.L.R. § 2211, a motion is considered "made" when it is served. Failure to abide by the time frame of Rule 511(b) "deprives a movant of the right to a mandatory change of venue absent evidence of the plaintiff's bad faith commencement of the action in an improper venue . . . and certain other factors." Castillo v. Metro Laundry, 299 A.D.2d 247, 248 (1st Dep't 2002) (citations omitted).

The defendant has the "initial burden on the motion to show that the . . . venue chosen by plaintiff is improper." Hernandez v. Seminatore, 48 A.D.3d 260 (1st Dep't 2008) (citations omitted). The defendant must offer documentary evidence to satisfy this burden. Broderick v. R.Y. Mgmt. Co. Inc., 13

A.D.3d 197 (1st Dep't 2004); Reaciniti v. Fairfax Partners, 309 A.D.2d 627 (1st Dep't 2003). For corporate defendants, production of the certificate of incorporation is sufficient, because the "designation of a county as the location of a corporation's principal office in a certificate of incorporation is controlling in determining corporate residence for the purposes of venue." Conway v. Gateway Assoc., 166 A.D.2d 388, 389 (1st Dep't 1990) (citations omitted). Thereafter, the plaintiff may defeat the motion by demonstrating with its own documentary evidence that either the plaintiff or the defendant resides in the county originally chosen. See e.g. Rivera v. Jensen, 307 A.D.2d 229 (1st Dep't 2003); Kay-Kanuteh v. Kenia, 288 A.D.2d 16 (1st Dep't 2001); Martinez v. Semicevic, 178 A.D.2d 228, 229 (1st Dep't 1991).

Defendants argue that none of them, as individuals, reside in New York County. Defendants further argue that the P.C. is a resident of Dutchess County and that the P.C. does business under the Group's name in New York County. Plaintiffs respond that defendants' motion is untimely, because defendants failed to bring their motion within fifteen days as required by Rule 511(b). Plaintiffs do not dispute the residences of the defendants as individuals; however, plaintiffs assert that the Group has a principal place of business in New York County, and argue that defendants failed to verify the residency of the Group.

Both sides agree that the fifteen day time period for making the motion to change venue began on October 9, and that October 24 was exactly fifteen days after October 9. October 24, however, was a Saturday. Therefore, the motion due date was extended until the next business day, Monday, October 26. Since defendants served the motion on that date, the motion was timely.

According to Article III of the P.C.'s certificate of incorporation, its principal office is in Dutchess County. Plaintiffs have offered no documentary evidence to dispute this fact. The Group, on the other hand, is unaccounted for in the documentary evidence. In order to legally do business in New York under a name other than its corporate name, the P.C. must file a certificate with the Secretary of State. N.Y. Gen. Bus. Law § 130. The purpose of Section 130 is to, among other things, allow a would-be plaintiff to ascertain not only whom he is suing but where the potential defendant resides. See Parks v. Steinbrenner, 115 A.D.2d 395, 396-97 (1st Dep't 1985). The "doing business as" certificate is, therefore, the documentary evidence required in this change of a venue motion. See Weis v. Saks Fifth Ave. 157 A.D.2d 475, 476 (1st Dep't 1990). Defendants' failure to include the "doing business as" certificate in their moving papers is fatal.

Defendants have failed to sustain their burden of proof in a change of venue motion. They have not demonstrated the residency of the Group with documentary evidence. The motion is therefore denied.

The parties shall appear for a preliminary conference on March 2, 2010 at 10:00 a.m., in Part 6, Courtroom 345, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: February 9, 2010

FILED
 FEB 16 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

JOAN E. LOBIS, J.S.C.